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code of federal regulations

Public Contracts and Property Management

ORIGINAL

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41

CHAPTERS 19 TO 100
Revised as of July 1, 1982

022-003-94845-7

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code of federal regulations

Public Contracts and Property Management

41

CHAPTERS 19 TO 100

Revised as of July 1, 1982

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Cite this Code **CFR**

thus: **41 CFR 19–1.000**

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

ISSUE DATES

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16 ..... as of January 1
Title 17 through Title 27 ..... as of April 1
Title 28 through Title 41 ..... as of July 1
Title 42 through Title 50 ..... as of October 1

The appropriate revision date is printed on the cover of each volume.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

HOW TO USE THE CODE OF FEDERAL REGULATIONS

The Code of Federal Regulations is kept up to date by the individual issues of the Federal Register. These two publications must be used together to determine the latest version of any given rule.

To determine whether a Code volume has been amended since its revision date (in this case, July 1, 1982), consult the "List of CFR Sections Affected (LSA)," which is issued monthly, and the "Cumulative List of Parts Affected," which appears in the Reader Aids section of the daily Federal Register. These two lists will identify the Federal Register page number of the latest amendment of any given rule.

EFFECTIVE AND EXPIRATION DATES

Each volume of the Code contains amendments published in the Federal Register since the last revision of that volume of the Code. Source citations for the regulations are referred to by volume number and page number of the Federal Register and date of publication. Publication dates and effective dates are usually not the same and care must be exercised by the user in determining the actual effective date. In instances where the effective date is beyond the cut-off date for the Code a note has been inserted to reflect the future effective date. In those instances where a regulation published in the Federal Register states a

date certain for expiration, an appropriate note will be inserted following the text.

OMB CONTROL NUMBERS

The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires Federal agencies to take steps to reduce the Federal paperwork burden for individuals, small businesses and State and local governments, as well as to maximize the usefulness of information collection. One specific requirement of the Act is for Federal agencies to display an OMB control number with the information collection request.

Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

OBSOLETE PROVISIONS

Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 1973, consult either the List of CFR Sections Affected, 1949-1963, or 1964-1972, published in three separate volumes. For the period beginning January 1, 1973, a "List of CFR Sections Affected" is published at the end of each CFR volume.

INCORPORATION BY REFERENCE

What is incorporation by reference? Incorporation by reference was established by statute and allows Federal agencies to meet the requirement to publish regulations in the Federal Register by referring to materials already published elsewhere. For an incorporation to be valid, the Director of the Federal Register must approve it. The legal effect of incorporation by reference is that the material is treated as if it were published in full in the Federal Register (5 U.S.C. 552(a)). This material, like any other properly issued regulation, has the force of law.

What is a proper incorporation by reference? The Director of the Federal Register will approve an incorporation by reference only when the requirements of 1 CFR Part 51 are met. Some of the elements on which approval is based are:

(a) The incorporation will substantially reduce the volume of material published in the Federal Register.

(b) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.

(c) The incorporating document is drafted and submitted for publication in accordance with 1 CFR 51.4.

Properly approved incorporations by reference in this volume are listed in the Finding Aids at the end of this volume.

What if the material incorporated by reference cannot be found? If you have any problem locating or obtaining a copy of material listed in the Finding Aids of this volume as an approved incorporation by reference, please contact the agency that issued the regulation containing that incorporation. If, after contacting the agency, you find the material is not available, please notify the Director of the Federal Register, National Archives and Records Service, Washington DC 20408, or call (202) 523-4534.

CFR INDEXES AND TABULAR GUIDES

A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled CFR INDEX AND FINDING AIDS This volume contains the Parallel Table of Statutory Authorities and Agency Rules (Table I), and Acts Requiring Publication in the Federal Register (Table III). A list of CFR Titles, Chapters, and Parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of Presidential documents appears at the end of each compilation of Title 3, The President.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the "Contents" entries in the daily Federal Register.

A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.

INQUIRIES AND SALES

For a summary, legal interpretation, or other explanation of any regulation in this volume, contact the issuing agency. Inquiries concerning editing procedures and reference assistance with respect to the Code of Federal Regulations may be addressed to the Director, Office of the Federal Register, National Archives and Records Service, General Services Administration, Washington, D.C. 20408 (telephone 202-523-3517). Sales are handled exclusively by the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

JOHN E. BYRNE,
Director,
Office of the Federal Register.

July 1, 1982.

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THIS TITLE

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Title 41—PUBLIC CONTRACTS AND PROPERTY MANAGEMENT consists of Subtitle A—Federal Procurement Regulations System, Subtitle B—Other Provisions Relating to Public Contracts and Subtitle C—Federal Property Management Regulations System. Subtitle D is reserved for other provisions relating to property management.

The Federal procurement regulations in Chapter 1 of Subtitle A are those goverment-wide procurement regulations issued by the General Services Administration. In Chapters 2 through 49 of Subtitle A are procurement regulations issued by individual government agencies. The first 49 parts in each of Chapters 2 through 49 are reserved for agency regulations *implementing* the Federal procurement regulations in Chapter 1 and are numerically keyed to them. The remaining parts in Chapters 2 through 49 contain agency regulations *supplementing* the Federal procurement regulations.

Other government-wide procurement regulations relating to public contracts appear in Chapters 50 through 100, Subtitle B.

The Federal property management regulations in Chapter 101 of Subtitle C are government-wide property management regulations issued by the General Services Administration. In the remaining chapters of Subtitle C are the *implementing* and *supplementing* property management regulations issued by individual government agencies. Those regulations which implement Chapter 101 are numerically keyed to it.

NUMBERING

The numbering system of Title 41 differs from that used for other titles of the *Code of Federal Regulations.* The numbering system is especially designed to permit the keying of agency regulations to government-wide regulations in Subtitles A and C which are issued by the General Services Administration. Chapters are designated by Arabic numerals. Each section number is a combination showing to the left of the decimal point the chapter and part numbers, separated by a dash. To the right of the decimal point the subpart, section, and subsection numbers are indicated in that order. Thus, an agency assigned to Chapter 2, and wishing to implement the cost-plus-a-fixed-fee contract provisions contained in Chapter 1, Part 1-3, Subpart 1-3.4, section 05, subsection 5 of the Federal Procurement Regulations (§ 1-3.405-5), would assign the section number "§ 2-3.405-5" to the implementing provisions.

Where material in the Federal Procurement Regulations (FPR) requires no implementation or deviation, there is no corresponding number in the agency regulations. Thus, there may be gaps in the sequence of numbers where the FPR, as written, are applicable to agency procurement.

Title 41 is composed of 13 volumes. The chapters in these volumes are arranged as follows: Chapter 1 (1-1 to 1-10), Chapter 1 (1-11 to App.)-Chapter 2 [Reserved], Chapters 3-6, Chapter 7, Chapter 8, Chapter 9, Chapters 10-17, Chapter 18 (Volumes I, II, and III), Chapters 19-100, Chapter 101, and Chapter 102 to end.

For this volume, Linda A. Rice-Johnston was Chief Editor. The Code of Federal Regulations publication program is under the direction of Martha B. Girard, assisted by Robert E. Jordan.

Title 41—Public Contracts and Property Management

(This book contains Chapters 19-100)

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Army Procurement Procedure, 32 CFR, Chapter V, Subchapter G.

Department of the Navy Procurement, Property, Patents, and Contracts, 32 CFR, Chapter VI, Subchapter D.

Air Force Procurement Regulations, 32 CFR, Chapter VII, Subchapter W.

Subtitle A—Federal Procurement Regulations System (Continued)

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CHAPTER 19—INTERNATIONAL COMMUNICATION AGENCY

NOTE: Nomenclature changes affecting this Chapter appear at 43 FR 28493, June 30, 1978.

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AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c).

§ 19–1.000 Scope of part.

This part describes the method by which the International Communication Agency implements and supplements the Federal Procurement Regulations, and contains procedures which implement and supplement Part 1–1 of the Federal Procurement Regulations.

[27 FR 6044, June 27, 1962]

Subpart 19–1.1—Introduction

SOURCE: 27 FR 6044, June 27, 1962, unless otherwise noted.

§ 19–1.100 Scope of subpart.

This subpart establishes Chapter 19 of the Federal Procurement Regulations System, and states its relationship to the Federal Procurement Regulations (FPR), and to other instructions governing contracting and procurement operations of the International Communication Agency.

§ 19–1.101 Establishment of ICA procurement policies and procedures.

This subpart establishes International Communication Agency (ICA) procurement policies and procedures (Chapter 19) as prescribed by the Director of ICA, to provide uniform policies and procedures applicable to procurement of personal property and nonpersonal services (including construction) and the procurement of real property by lease, for all ICA activities.

[31 FR 10789, Aug. 13, 1966]

§ 19–1.102 Authority.

The International Communication Agency Procurement Regulations are prescribed by the Director of the International Communication Agency pursuant to the authority of the Reorganization Plan No. 2 of December 13, 1977, and Executive order 12048 of March 27, 1978, and the Federal Property and Administrative Services Act of 1949 as amended.

[43 FR 28493, June 30, 1978]

§ 19–1.103 Relationship of Chapter 19 to the FPR and other procurement instructions.

(a) Chapter 19 implements and supplements the FPR. Material published in the FPR, which has Government-wide applicability, becomes effective throughout the ICA upon the effective date of the particular FPR material. Such material generally will not be repeated, paraphrased, or otherwise restated in Chapter 19.

(b) Implementing material is that which expands upon related FPR material. It will treat a similarly numbered portion of the FPR in greater detail or indicate the manner of compliance or deviation.

(c) Supplementing material is that for which there is no counterpart in the FPR.

(d) The absence of a corresponding part, subpart, section, etc. in Chapter 19 indicates that the FPR is applicable as written.

(e) Procurement instructions necessary to implement or supplement the FPR and Chapter 19, will be issued by the Chief of the Contract and Procurement Division, Office of Administrative Services (MGT/AC). These instructions, together with the FPR and Chapter 19, constitute the International Communication Agency Procurement Regulations (IAPR).

[27 FR 6044, June 27, 1962, as amended at 43 FR 28493, June 30, 1978]

§ 19–1.104 Applicability.

Chapter 19 applies to all purchases and contracts made by the International Communication Agency for the procurement of personal property and nonpersonal services (including construction) and the procurement of real property by lease, within the United States.

[31 FR 10789, Aug. 13, 1966]

§ 19–1.105 Method of issuance.

(a) All Chapter 19 material deemed necessary for an understanding, by business concerns and others interested, of basic and significant ICA policies and procedures, will be published in the FEDERAL REGISTER. Other related material also may be published in the FEDERAL REGISTER when its inclusion will provide a logical, comprehensive statement of ICA procurement policies and procedures.

(b) The Chapter 19 material published in the FEDERAL REGISTER will be published in cumulative form in Chapter 19 of Title 41 of the Code of Federal Regulations. The FEDERAL REGISTER and Title 41 of the Code of Federal Regulations may be purchased from the Superintendent of Documents, Government Printing Office, Washington 25, D.C.

§ 19–1.106 Exclusions.

(a) Certain policies and procedures within the scope of this Chapter 19 may be excluded when any of the following criteria are applicable:

(1) Subject matter which bears a security classification.

(2) Policies or procedures which are expected to be effective for a period of less than six months.

(3) Policies and procedures which are effective on an experimental basis for a reasonable period.

(4) Policies and procedures pertaining to other functions of ICA as well

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as to procurement functions and there is need to make the issuance available simultaneously to all ICA employees concerned.

(5) Speed of issuance is essential, numerous changes are required in Chapter 19, and all necessary changes cannot be made promptly.

(b) Procurement procedures and instructions issued in other than the FPR System format under (a) (4) and (5), of this section, will be codified into Chapter 19 at the earliest practicable date, but in any event not later than six months from date of issuance.

§ 19-1.107 Arrangement.

§ 19-1.107-1 General plan.

Chapter 19 is divided into parts, subparts, sections, subsections, and further subdivisions as necessary.

§ 19-1.107-2 Numbering.

(a) Generally, the numbering system used in Chapter 19 conforms to that in the FPR (See § 1-1.007-2). Thus, a particular procurement policy or procedure is identified by the same number in both the FPR and in Chapter 19 except that the first number in the FPR will be 1 rather than 19.

(b) Where Chapter 19 implements a part, subpart, section, or subsection of the FPR, the implementing part, subpart, section or subsection of Chapter 19 will be numbered (and captioned) to correspond to the FPR part, subpart, section, or subsection.

(c) Where Chapter 19 supplements the FPR and thus deals with subject matter not contained in the FPR, the numbers in the group 50 through 69 will be assigned to the respective supplementing parts, subparts, or section.

(d) Where the subject matter contained in the part, subpart, section, or subsection of the FPR requires no implementation, Chapter 19 will contain no corresponding part, subpart, section, or subsection. Thus, there may be gaps in the Chapter 19 series of part, subpart, section, or subsection; in such cases, reference must be made to the FPR for policy and procedure applicable to ICA.

§ 19-1.107-3 Citation.

ICA procurement regulations will be cited in accordance with Federal Register standards approved for the FPR. Thus, this section, when referred to in divisions of the IAPR, should be cited as "§ 19-1.107-3 of this chapter." When this section is referred to formally in official documents, such as legal briefs, it should be cited as "41 CFR 19-1.107-3." Any section of the ICA Procurement Regulations may be informally identified, for purposes of brevity, as IAPR followed by this section number; i.e. "IAPR 19-1.107-3."

§ 19-1.108 Deviation.

§ 19-1.108-1 Description.

The term "deviation" includes any of the following actions:

(a) When a prescribed contract clause is set forth verbatim, use of a contract clause covering the same subject matter which varies from that set forth.

(b) When a standard or other form is prescribed, use of any other form for the same purpose.

(c) Alteration of a prescribed standard or other form, except as may be authorized by regulations.

(d) The imposition of lesser or, where the regulation expressly prohibits, greater limitations than are imposed upon the use of a contract clause, form, procedure, type of contract, or upon any other procurement action, including but not limited to, the making or amendment of a contract, or actions taken in connection with the solicitation of bids or proposals, award, administration, or settlement of contracts.

(e) When a policy or procedure is prescribed, use of any inconsistent policy or procedure.

§ 19-1.108-2 Procedure.

In the interest of establishing and maintaining uniformity to the greatest extent feasible, deviations from the Federal Procurement Regulations System shall be kept to a minimum and controlled as follows:

(a) In individual cases, deviations from the FPR and IAPR shall be authorized by the the Chief of the Con-

tract and Procurement Division (MGT/AC). This authority may not be redelegated.

(1) A supporting statement for each deviation which indicates briefly the nature of the deviation and the reasons for such special action shall be included in the contract file.

(2) A copy of the supporting statement for each deviation shall be forwarded to the Chief of the Contract and Procurement Division.

(b) In classes of cases, deviations will be considered on an expedited basis jointly by the Chief, Contract and Procurement Division, and the General Services Administration unless, in the considered judgment of the Chief, Contract and Procurement Division, circumstances preclude such joint effort, in which case he/she will notify the General Services Administration of the deviation.

[27 FR 6044, June 27, 1962, as amended at 43 FR 28493, June 30, 1978]

Subpart 19-1.2—Definition of Terms

SOURCE: 31 FR 10789, Aug. 13, 1966, unless otherwise noted.

§ 19-1.201 Definitions.

For the purposes of this chapter, the following terms have the meanings set forth in this subpart, unless otherwise indicated.

§ 19-1.206 Chief, Contract and Procurement Division.

The Chief of the Contract and Procurement Division, the "Head of the procuring activity," is also designated the "Chief Contracting Officer" and, in some cases, the "Agency Contracting Officer."

§ 19-1.250 Government.

"Government" means the Government of the United States of America, and shall be deemed to include any department or organizational component thereof, including the Agency.

§ 19-1.251 Agency.

"Agency" means the International Communication Agency, acting through any of its duly authorized officials.

§ 19-1.252 Director.

"Director" means the head or any assistant head of the Agency (see § 1-1.204 of this title).

§ 19-1.253 ICA.

"ICA" means the International Communication Agency.

§ 19-1.254 Overseas Establishment.

"Overseas Establishment" means ICA post or media extension.

[31 FR 10789, Aug. 13, 1966. Redesignated and amended at 43 FR 28493, June 30, 1978]

§ 19-1.255 AR/CO.

"AR/CO" means Authorized Representative of the Contracting Office (see § 1.5305).

[31 FR 10789, Aug. 13, 1966. Redesignated at 43 FR 28493, June 30, 1978]

§ 19-1.256 Subcontract.

"Subcontract," in addition to other legal definition, is intended to include any prime contractor's purchase order accepted by a vendor, unless otherwise provided in the prime contract.

[31 FR 10789, Aug. 13, 1966. Redesignated at 43 FR 28493, June 30, 1978]

Subpart 19-1.3—General Policies

SOURCE: 31 FR 10790, Aug. 13, 1966, unless otherwise noted.

§ 19-1.302 Procurement sources.

§ 19-1.302-3 Contracts between the Government and Government employees or business concerns substantially owned or controlled by Government employees.

(a) [Reserved]

(b)(1) Any exception, as described in § 1-1.302-3(a) of this title, must be supported by written findings and a determination signed by the Director. In these cases, the "Director" means only the Director or Acting Director of the Agency.

(2) The Agency may purchase, rent, license, or otherwise acquire materials in which Agency employees have a financial interest, only after obtaining a determination and supporting findings signed by the Director that such pro-

curement is based upon the most compelling reasons, such as cases when the needs of the Agency cannot reasonably be otherwise supplied. If the Agency employee is the author or originator of copyrighted material, it must be established that there is no real or apparent conflict of interest between his/her official duties and his/her rights to any royalties. To prevent such conflict, the Agency shall endeavor to obtain the employee's waiver of any royalty payments. In addition, the employee would be expected to discourage publicity regarding Agency use of his/her material.

[31 FR 10790, Aug. 13, 1966, as amended at 43 FR 28493, June 30, 1978]

§ 19-1.302-51 Contracts between the Government and former Government employees.

Negotiated contracts may be entered into with ex-employees of the Agency or with firms in which ex-employees are known to have a substantial interest, within a period of 2 years subsequent to the termination of employment, only with the written approval of the Director.

§ 19-1.305-3 Deviations from Federal Specifications.

Any deviation from a Federal Specification contemplated under § 1-1.305-3 of this title shall be submitted to the Chief of the Contract and Procurement Division of the Agency, for approval prior to use. The request shall include a statement describing the deviation, with justification therefor and, where applicable, a recommendation for revision or amendment of the specification.

§ 19-1.313 Records of contract actions.

(a) The documents, memoranda, and summary statements contemplated by § 1-1.313 of this title shall include but not be limited to the following, unless the Contracting Officer determines certain elements are not required:

(1) A copy of the procurement request;

(2) A copy of any required Determinations and Findings, or other statement and justification for negotiation;

(3) A list of sources solicited or a justification for limiting such sources;

(4) A copy of any determination to set-aside the procurement for small business or for a labor-surplus area;

(5) A copy of the Invitation for Bids or Request for Proposals, including any plans or specifications or references thereto;

(6) All bids or proposals received with an abstract thereof;

(7) The bidders' Statement of Contingent Fees;

(8) All preaward surveys;

(9) Selection of the successful Contractor, including—

(i) The reasons for selection.

(ii) The Contracting Officer's determination of the Contractor's responsibility, and

(iii) Any Small Business Administration Certificate of Competency;

(10) All price and cost data submitted or used, including Certificate of Current Cost or Pricing Data;

(11) A full record of negotiations, including but not limited to—

(i) Participants,

(ii) Dates of meetings or phone calls,

(iii) Government-furnished materials or facilities to be provided,

(iv) Subcontracting,

(v) Terms and conditions agreed to,

(vi) Deviations, if any, from prescribed contract clauses,

(vii) Technical recommendations, and

(viii) Justification for final price;

(12) Justification for type of contract used;

(13) Any exceptions or exemptions from the Buy American Act or from the Agency's Foreign Purchases policy (see Subpart 6.50 of this chapter);

(14) A copy of contract award;

(15) Evidence of legal review required, and copy of comments, if any, made by legal counsel;

(16) All pertinent correspondence;

(17) Copies of all change orders, and supplements, with supporting documents;

(18) Comprehensive termination data;

(19) Copies of royalty reports received;

(20) Final release upon completion of the contract;

(21) Required approvals of contract; and

(22) Any additional documents considered necessary to present a complete résumé of the contract action.

(b) Complete record of all advertised and negotiated contract action will be preserved for the period required by records management instructions.

(c) This § 19-1.313 does not apply in the case of small purchases.

(d) Memoranda, for documenting actions taken, should not duplicate information evident in other file documents except where clarification is required. Copies of all negotiation memoranda will be submitted to the Chief of the Contract and Procurement Division. All memoranda will be signed and the drafting date will be indicated.

§ 19-1.317 Noncollusive bids and proposals.

(a)-(d) [Reserved]

(e) The Chief, Contract and Procurement Division, is authorized to make the determinations described in paragraph (d) of the Certification of Noncollusion prescribed in § 1-1.317 of this title.

§ 19-1.354 Execution of contracts.

Contracts, purchase orders, delivery orders, Government bills of lading, and other types of purchasing documents will be executed only by officials holding valid, written delegations or redelegations of procurement authority issued by the Director or other officer of the Agency designated in writing to make such delegations or redelegations. All purchasing documents, including amendments, will show the actual date of each signature required for their execution, and the Agency office executing such documents shall maintain a record of the actual date the documents were released to the vendor or contractor.

§ 19-1.355 Violations of law.

(a) In the event procurement personnel have reason to believe there is evidence of violation of law of any nature whatsoever in bids or proposals received, they will prepare a complete report for forwarding to the Office of the General Counsel through the Chief of the Contract and Procurement Division.

(b) In case of possible violation of antitrust laws, the report will be prepared in accordance with such guidance as provided in the Federal Procurement Regulations (see Subpart 1-1.9 of this title).

Subpart 19-1.6—Debarred, Suspended, and Ineligible Bidders

SOURCE: 31 FR 10790, Aug. 13, 1966, unless otherwise noted.

§ 19-1.602 Establishment and maintenance of a list of concerns or individuals debarred, suspended, or declared ineligible.

The Policy and Procedures Branch of the Contract and Procurement Division will maintain a consolidated list as indicated in § 1-1.602 of this title. The list will not be classified but will be marked "For Official Use Only." It will be coordinated with the Bidders Mailing List (see § 1-2.205 of this title), and appropriate notations will be made on both lists, when additions or deletions are necessary.

[31 FR 10790, Aug. 13, 1966, as amended at 43 FR 28493, June 30, 1978]

§ 19-1.604 Causes and conditions applicable to determination of debarment by an executive agency.

Personnel of the Agency who find that a firm or an individual should be added to the Debarred, Suspended, or Ineligible Bidders List, as indicated in Subpart 1-1.6 of this title, shall notify the Chief, Policy and Procedures Branch promptly. Debarment shall be made only upon approval of the Chief of the Contract and Procurement Division of the Agency.

[31 FR 10790, Aug. 13, 1966, as amended at 43 FR 28493, June 30, 1978]

Subpart 19-1.7—Small Business Concerns

§ 19-1.704 Agency program, direction and operation.

The Chief of the Contract and Procurement Division is responsible for developing and supervising the ICA Small Business Program, as may be re-

quired for compliance with Subpart 1-1.7 of this title.

[31 FR 10791, Aug. 13, 1966]

Subpart 19-1.9—Reporting Possible Antitrust Violations

§ 19-1.902 Documents to be transmitted.

The Contracting Officer will submit a report, including the documents listed in § 1-1.902 of this title and any other pertinent documentary material, with his/her findings to the Chief of the Contract and Procurement Division.

[31 FR 10791, Aug. 13, 1966]

Subpart 19-1.13—Minority Business Enterprises

§ 19-1.1302 Agency program.

The Chief, Contract and Procurement Division is designated as being responsible for administering the procurement minority business enterprise program in accordance with Subpart 1-1.13 of this title.

[43 FR 28493, June 30, 1978]

Subpart 19-1.53—Procurement Authority and Responsibility

SOURCE: 31 FR 10791, Aug. 13, 1966, unless otherwise noted.

§ 19-1.5301 General.

(a) This subpart deals with the authority to designate Contracting Officers and sets forth the general authorities and responsibilities of such officers (see § 1-3.801(b) of this title).

(b) An employee ordinarily binds the Government only when his/her actions are in accordance with authority actually granted to him/her. Contracting Officers are agents of the Government and shall act in accordance with law, regulations including FPR and IAPR, other pertinent directives, and sound business judgment, and within the limits of their prescribed duties and authorities.

§ 19-1.5302 Designation of Contracting Officers.

(a) Contracting Officers, as defined in § 1-1.207 of this title, shall be those employees in whom contracting authority is vested by the Director or his/her designees by means of appropriate delegations of authority and by redelegations of authority. The authority of such Contracting Officers shall be in accordance with the applicable delegations or redelegations of authority and with this Subpart 19-1.53.

(b) Delegations and redelegations of authority are generally directive on specific positions, rather than specific individuals. When a specific position carries delegated or redelegated contracting authority, an individual appointed to such a position is, therefor, a Contracting Officer. Such appointments are normally made by means of administrative personnel actions. When an individual is designated as a Contracting Officer by an instrument other than personnel action, a copy of the designating instrument shall be forwarded to the appropriate personnel office for inclusion in the file of the individual affected. Designations shall be rescinded in the same manner upon termination of the assignment (but special assignments may be self-rescinding, as, for example, an assignment made in terms of the life of a specific contract, in which case a separate rescission instrument would not be required).

(c) In view of the high degree of individual responsibility and authority vested in Contracting Officers, care shall be exercised to insure that only well qualified individuals are appointed or designated and retained in such positions. Accordingly, the performance of their duties as Contracting Officers is subject to continuing review and evaluation.

§ 19-1.5303 General authority of Contracting Officers.

A contracting Officer is authorized to enter into, modify, and take other appropriate action with respect to contracts, within the limits of his/her prescribed duties and authority.

§ 19-1.5304 General responsibility of Contracting Officers.

(a) Contracting Officers are primarily responsible for assurance that contracts are authorized by law, for the execution and administration of contracts, for safeguarding the interest of the United States in contractual relationships, and for determining the facts under contracts.

(b) Contracting Officers shall personally sign all contracts and modifications entered into by them. The signing of original contractual documents shall not be accomplished by facsimile stamps or by proxy. However, the use of reproduced signatures on reproduced copies after the Contracting Officers have manually signed the master and other originals is acceptable.

(c) Contracting Officers are responsible for the legal, technical, and administrative sufficiency of the contracts they make. To this end, they shall secure necessary legal, technical, and financial advice within ICA.

(d) Contracting Officers are responsible for assuring contract compliance on the part of the Contractor.

§ 19-1.5305 Contracting Officers' representatives.

(a) Any properly qualified Government employee or group of employees, may be designated to act as the Authorized Representative of a Contracting Officer. Such designation shall be in writing and shall define the scope and limitations of the Authorized Representative's authority.

(b) A designation authorized by this § 19-1.5305 may be made by instructions referring to particular contractual instruments or categories of instruments and may empower the Authorized Representative to take any or all action thereunder which could lawfully be taken by the Contracting Officer to the extent not specifically prohibited by the terms of the contractual instrument involved or this § 19-1.5305. In no event shall an Authorized Representative, by virtue only of his/her designation as such, be empowered to execute or agree to any contract or modification thereof; such powers must be specifically included as a part of, or supplement to, the designation.

(c) A Contracting Officer may assign administration of a specific contractual instrument to another Contracting Officer, provided the assignee Contracting Officer's delegated authority permits, and the Contractor shall be so notified. Such an assignment shall define the extent to which part or all of the original Contracting Officer's authority is transferred but shall not pass on to the successor any authorities which would exceed the limitations imposed on the successor by existing directives.

[31 FR 10791, Aug. 13, 1966, as amended at 43 FR 28493, June 30, 1978]

§ 19-1.5306 Responsibility for assuring the availability of funds.

Prior to the incurrence of an obligation, Contracting Officers shall assure themselves that adequate funds are available.

§ 19-1.5307 Standards of conduct.

All personnel engaged in procurement and related activities shall conduct business in a manner above reproach in every respect. Transactions relating to expenditure of public funds require the highest degree of public trust to protect the interests of the Government. While many Federal laws and regulations place restrictions on the actions of governmental personnel, the latter's official conduct must, in addition, be such that the individual would have no reticence about making a full public disclosure thereof.

PART 19-2—PROCUREMENT BY FORMAL ADVERTISING

Subpart 19-2.2—Solicitation of Bids

Sec.

19-2.203 Methods of soliciting bids.
19-2.203-1 Mailing or delivering to prospective bidders.
19-2.204 Records of invitations for bids and records of bids.
19-2.205 Bidders mailing lists.
19-2.205-1 Establishment of lists.

Subpart 19-2.3—Submission of Bids

Sec.
19-2.304 Modification or withdrawal of bids.

Subpart 19-2.4—Opening of Bids

19-2.401 Receipt and safeguarding of bids.
19-2.402 Opening of bids.
19-2.403 Recording of bids.
19-2.406 Mistakes in bids.
19-2.406-3 Other mistakes disclosed before award.
19-2.406-4 Disclosure of mistakes after award.
19-2.407 Award.
19-2.407-3 Discounts.
19-2.407-5 Other factors to be considered.
19-2.407-7 Statement and certificate of award.
19-2.407-8 Protests against award.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c).

SOURCE: 31 FR 10792, Aug. 13, 1966, unless otherwise noted.

Subpart 19-2.2—Solicitation of Bids

§ 19-2.203 Methods of soliciting bids.

§ 19-2.203-1 Mailing or delivering to prospective bidders.

The initial distribution of invitations for bids and preinvitation notices shall be made to firms on Agency bidders mailing lists and to all others whom the Contracting Officer may select.

§ 19-2.204 Records of invitations for bids and records of bids.

Each branch of the Contract and Procurement Division shall maintain a record of each invitation for bids issued and distributed by it as well as a record of all bids. The prospective bidders listed for each invitation shall be furnished with applicable amendments or notices, and a record will be kept of their distribution. Records of bids shall be kept in accordance with the procedures set forth in §1- 2.403.

§ 19-2.205 Bidders mailing lists.

§ 19-2.205-1 Establishment of lists.

Bidders mailing lists shall be established and maintained by the Policy and Procedures Branch for use in all Agency procurement activities and requirement offices. Lists shall include all eligible and qualified bidders who have requested listing or whom Contracting Officers consider eligible and qualified to furnish the requirements of a particular procurement. The latter shall be requested to submit a completed Standard Form 129 and an Agency Form IA-407, Commodity and Service Code Lists. Agency procurement activities and requirement offices should recommend the establishment of additional lists for anticipated requirements of nonlisted commodities or services and furnish the names and addresses of prospective bidders.

[31 FR 10792, Aug. 13, 1966, as amended at 43 FR 28493, June 30, 1978]

Subpart 19-2.3—Submission of Bids

§ 19-2.304 Modification or withdrawal of bids.

(a) Bid modifications received prior to time of opening shall be processed in the same manner as bids and shall be attached to the bid envelope.

(b) The receipt required for withdrawal of a bid (see § 1-2.304 of this title) shall read as follows:

I certify that I am a bona fide, fully authorized ☐ agent, ☐ official, ☐ employee, ☐ representative of ———————————

———————————

whose bid on IFB No. ———————————
is scheduled for opening on ———————————
———————————. I hereby withdraw that bid from consideration.

———————————
(Name)

(Date) ———————————

I hereby acknowledge return of the abovementioned bid.

———————————
(Name)

(Date) ———————————

Subpart 19-2.4—Opening of Bids

§ 19-2.401 Receipt and safeguarding of bids.

(a) All bid envelopes or modifications thereto shall be date stamped immediately upon receipt and then promptly delivered unopened to the issuing office. Bids received by the issuing office from the mail room shall be

recorded on the applicable mailing list and kept in a locked cabinet until the time for public opening of bids. Bids delivered by messenger shall be marked by the recipient with the date and time of receipt.

§ 19-2.402 Opening of bids.

(a) Public bid openings shall be held at the time and place announced in invitations for bids by the Contracting Officer or his/her designee. Bid openings shall be opened to business representatives, members of the press, and the general public and a record made of their attendance. The names of bidders or their representatives in attendance shall be recorded in the appropriate column of the Abstract of Bids.

(b) The information required to be abstracted on Agency Form IA-22, Abstract of Bids, shall be read aloud by the official in charge of the bid opening. Duplicate copies of bids shall be made available for public examination until the Abstract of Bids is completed and made available in lieu thereof. Bids submitted in an original only shall be made available for examination in accordance with § 1-2.402(c) of this title.

(c) The official in charge of a bid opening shall not discuss the relative merits of bids or issue any statements relative to award or mistakes in bids. Answers to protests of bidders and inquiries regarding award shall be deferred until after the completion of the bid opening and evaluations by the Contracting Officer.

§ 19-2.403 Recording of bids.

(a) Agency Form IA-22, Abstract of Bids, shall be used to record bids at the time and place of bid opening. Upon completion of the tabulation, normally within 24 hours, the bid opening officer shall certify on the abstract that he/she opened and read all bids received and verified all entries made therein. Late bids determined to be eligible shall be included on the abstract.

(b) Immediately upon mailing notices of awards, a copy of the abstract indicating the successful bidder(s) shall be delivered to the Policy and Procedures Branch for placement in the Abstract of Bid register where it shall be available for examination by the public. The original abstract with all related correspondence shall be placed in the official contract file.

(c) The invitation mailing list shall upon award, be coded to indicate action to be taken with respect to the master Bidders Mailing List. The original shall be placed in the official contract file and the duplicate delivered to the Policy and Procedures Branch. Lists shall be coded as follows:

	Code
Received award	A
Submitted a bid	B
Submitted a late bid (returned)	L
Failed to respond	X
Failed to bid, retain	XR
New, place on list	N

In the event of a split award, all successful bidders shall be coded "A."

[31 FR 10792, Aug. 13, 1966, as amended at 43 FR 28493, June 30, 1978]

§ 19-2.406 Mistakes in bids.

§ 19-2.406-3 Other mistakes disclosed before award.

(a) The Chief, Contract and Procurement Division, is the designated authority to make administrative determinations regarding withdrawal or correction of bids.

(b) Evidence in support of an alleged mistake, together with the data set forth in § 1-2.406-3(d)(3) of this title, will be referred to the Chief, Contract and Procurement Division, for a determination.

§ 19-2.406-4 Disclosure of mistakes after award.

(a) The Chief, Contract and Procurement Division, is the designated authority to make administrative determinations with respect to mistakes disclosed after award.

(b) Whenever a mistake is alleged or disclosed after award and the Contracting Officer proposes the contract be rescinded or reformed, he/she shall furnish the Chief, Contract and Procurement Division, with the Contractor's statement, evidence, and the data set forth in § 1-2.406-4(f)(2) of this title, upon which to base a determination.

§ 19-2.107 Award.

§ 19-2.407-3 Discounts.

Offers of discounts for prompt payment in less than 20 calendar days will not be considered in the evaluation of bids.

§ 19-2.407-5 Other factors to be considered.

(a) Award to a bidder who offers to furnish foreign-made products will be dependent upon price factors mentioned in § 6.500 of this chapter.

(b) A bid which is qualified or deviates from the specifications of a single item need not be rejected provided the invitation does not restrict the Agency's right to award by item. Certain items or groups of items may be rejected as nonresponsive, whereas those which are not qualified or do not deviate from the specifications may be considered for award.

§ 19-2.407-7 Statement and certificate of award.

When an award is to be made to other than the low bidder, the names of all low bidders and the amounts of their bids shall be listed on Standard Form 1036 or similar Agency form. The Contracting Officer shall also state the reason for rejection of each lower bid and acceptance of the higher offer.

[43 FR 28493, June 30, 1978]

§ 19-2.407-8 Protests against award.

(a) In the event that a protest against the making of an award has been lodged directly with the Comptroller General, a determination to make an award pursuant to § 1-2.407-8(b)(3) of this title by the Contracting Officer will be made only upon receipt of written approval of the Chief, Contract and Procurement Division.

(b) When a protest is received after award of a contract, the Contracting Officer will prepare a statement with respect to all the pertinent facts in the case and prepare a reply to the protest. The reply will be submitted for the concurrence of the Chief, Contract and Procurement Division, and the Office of the General Counsel.

PART 19-3—PROCUREMENT BY NEGOTIATION

Subpart 19-3.1—Use of Negotiation

Sec.
19-3.150 Selection of sources.

Subpart 19-3.3—Determinations, Findings, and Authorities

19-3.305 Form and requirements of determination and findings.

Subpart 19-3.4—Types of Contracts

19-3.405 Cost-reimbursement type contracts.
19-3.405-5 Cost-plus-a-fixed-fee contract.
19-3.406 Other types of contracts.
19-3.406-1 Time and materials contract.
19-3.408 Letter contract.
19-3.450 Oral contract.

Subpart 19-3.6—Small Purchases

19-3.602 Policy.
19-3.603 Competition.
19-3.603-1 Solicitation.
19-3.604 Imprest funds (petty cash) method.
19-3.604-6 Procurement and payment.
19-3.605 Purchase order forms.
19-3.605-3 Agency order forms.
19-3.606 Blanket purchase arrangements.
19-3.606-5 Agency implementation.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c).

SOURCE: 31 FR 10793, Aug. 13, 1966, unless otherwise noted.

Subpart 19-3.1—Use of Negotiation

§ 19-3.150 Selection of sources.

In the selection of sources for requests for proposals, procurement personnel will use the bidders mailing lists to the fullest extent and will be guided by §19-2.205 of this chapter.

Subpart 19-3.3—Determinations, Findings, and Authorities

§ 19-3.305 Form and requirements of determinations and findings.

(a) The form of determinations and findings is not prescribed beyond the requirements in § 1-3.305 of this title except that they must all be in writing and signed by an Agency official. Any determination and findings signed by

an official other than the Contracting Officer will be initialed by the Contracting Officer when inserted in a contract file as a supporting document.

Subpart 19-3.4—Types of Contracts

§ 19-3.405 Cost-reimbursement type contracts.

§ 19-3.405-5 Cost-plus-a-fixed-fee contract.

(a)-(b) [Reserved]

(c) *Limitations.* (1) The "estimated cost of the contract, exclusive of the fee, as determined by the Agency head," required by section 304(b) of the Act (41 U.S.C. 254(b)), will be prepared in writing for signature by the Chief, Contract and Procurement Division.

(2) Indirect or overhead costs, in cost-plus-a-fixed-fee contracts, which are calculated as a stipulated percentage of direct labor or other costs, are prohibited except where there is a provision for a subsequent adjustment to the actual indirect costs.

§ 19-3.406 Other types of contracts.

§ 19-3.406-1 Time and materials contract.

(a)-(b) [Reserved]

(c) *Limitations.* The determination, that no other type of contract will suitably serve, will be made in a memorandum with supporting findings for the contract file and signed by the Contracting Officer.

§ 19-3.408 Letter contract.

(a)-(b) [Reserved]

(c) *Limitations.* (1) The determination, that no other type of contract is suitable, will be made in a memorandum with supporting findings for the contract file and signed by the Chief of the Contract and Procurement Division.

(2) [Reserved]

(3) A letter contract should be superseded by a definitive contract within 3 months of the effective date of the letter contract. Any extension beyond 3 months must be approved by the Chief of the Contract and Procurement Division.

(4) The maximum liability of the Government under a letter contract shall not exceed 50 percent of the total estimated cost of the project or procurement as established by the head of the Agency, except upon a written determination with supporting findings, signed by the Chief of the Contract and Procurement Division, that it is in the best interest of the Government.

§ 19-3.450 Oral contract.

Oral contracts may be made by an authorized Contracting Officer only, in cases of unusual urgency where delivery of a letter contract is not possible, if the agreement would otherwise be a valid written contract. The oral agreement must be reduced to writing as soon as possible and will be subject to the same Agency process of clearances and approvals as any other written contract. The exercise of this authority must be justified in a memorandum for the Chief of the Contract and Procurement Division, and a copy of the memorandum will be placed in the contract file.

[31 FR 10793, Aug. 13, 1966, as amended at 43 FR 28493, June 30, 1978]

Subpart 19-3.6—Small Purchases

§ 19-3.602 Policy.

Agency procurement personnel will be guided by Subchapter E of the Federal Property Management Regulations—Supply and Procurement—Parts 101-25 through 101-31, as well as by Subpart 1-3.6 of this title and this Subpart 19-3.6.

§ 19-3.603 Competition.

§ 19-3.603-1 Solicitation.

(a)-(c) [Reserved]

(d) Quotations as a result of oral solicitation will re-recorded on Form IA-25 (Rev). Use of this form will not be required to document routine single-item purchases which may be recorded on the requisition provided such record contains all information called for on Form IA-25.

§ 19–3.604 Imprest funds (petty cash) method.

§ 19–3.604–6 Procurement and payment.

(a) Small purchases utilizing imprest funds may be made only by employees designated as having such authority in accordance with the Agency's Manual of Operations and Administration.

(b) The cost of cash purchases must be kept within reasonable bounds by ordinary shopping procedures of price comparison (competition), and the buyer must take advantage of any obtainable discounts.

[31 FR 10793, Aug. 13, 1966, as amended at 43 FR 28494, June 30, 1978]

§ 19–3.605 Purchase order forms.

§ 19–3.605–3 Agency order forms.

Where Standard Forms 147 and 148 are not appropriate, Agency order forms prescribed in Subpart 16–3 of this chapter shall be used.

§ 19–3.606 Blanket purchase arrangements.

§ 19–3.606–5 Agency implementation.

(a) The use of limited charge accounts, for all Agency offices and installations having responsibility for maintaining their own supply points, is a preferred Agency procedure. Blanket purchase arrangements will be made and the necessary procurement authority redelegated by the Chief of the Contract and Procurement Division when offices which provide their own supplies can make numerous purchases of a wide variety of regularly needed items from local vendors.

(b) Blanket purchase arrangements will be in writing, and may be in the form of a purchase order which will ordinarily cover the vendor's complete line of merchandise or services available at his/her published list prices less any obtainable discounts, limited in time to one fiscal year and in amount by $10,000 or less. More than one arrangement may be advisable where the volume of purchases warrants such competitive arrangements. Charge tickets will be made for each order and delivered to the responsible office with receipt of the goods indicated thereon by the receiving office. Monthly invoices will be compared by the responsible office with delivery receipts prior to certification for payment. A copy of the blanket purchase agreement is to be filed with the appropriate paying office.

[31 FR 10793, Aug. 13, 1966, as amended at 43 FR 28494, June 30, 1978]

PART 19–6—FOREIGN PURCHASES

Subpart 19–6.1—Buy American Act—Supply and Service Contracts

Sec.
19–6.103 Exceptions.
19–6.103–3 Unreasonable cost or inconsistency with the public interest.
19–6.105 Excepted articles, materials, and supplies.

Subpart 19–6.50—Other Price Differentials

19–6.5001 General.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c).

SOURCE: 31 FR 10794, Aug. 13, 1966, unless otherwise noted.

Subpart 19–6.1—Buy American Act—Supply and Service Contracts

§ 19–6.103 Exceptions.

§ 19–6.103–3 Unreasonable cost or inconsistency with the public interest.

(a) It has been determined by the Director that the application of the Buy American Act to the purchase of books, maps, periodicals, newspapers, and other publications and films not published in the United States would be inconsistent with the public interest. Therefore, such items may be procured from foreign sources.

(b) Contracting Officers are authorized to make determinations of unreasonable cost or inconsistency with the public interest on other domestic source end products, both prior to entering into contracts and in the course of contract administration, provided that in the latter case the Government receives adequate consideration. A copy of each determination will be included in the contract file.

§ 19-6.105 Excepted articles, materials, and supplies.

Contracting Officers are authorized to make determinations of nonavailability (see § 1-6.103-2 of this title), both prior to entering into contracts and in the course of contract administration, provided that in the latter case the Government receives adequate consideration. A copy of each determination will be included in the contract file.

Subpart 19-6.50—Other Price Differentials

§ 19-6.5001 General.

(a) Agency policy for procurement from foreign sources for use outside the United States requires the application of price differentials favoring materials and equipment produced in the United States. The individual requests for proposals or invitations for bids will indicate the extent of applicable differentials.

(b) The Agency will, to the maximum extent consistent with effective discharge of its program responsibilities, forgo or postpone the purchase of materials and equipment which are not obtainable as domestic source end products (as defined in § 1-6.101(d) of this title), or the award of contracts for nonpersonal services (including construction) to other than U.S. citizens or firms which are more than 50 percent owned by U.S. citizens, except where payment may be made with excess foreign currencies (as designated by the Treasury Department) at no greater cost than corresponding domestic source end products or contracts with U.S. citizens or firms more than 50 percent owned by U.S. citizens.

PART 19-15—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 19-15.50—Cost Principles and Procedures

§ 19-15.5000 Cost-reimbursed air travel.

It is the policy of the Agency to require the use of less than first-class air accommodations for all cost-reimbursed travel and that the lowest class accommodations available are utilized in order to reduce government travel costs. Exceptions to this policy are to be in accordance with the limitations set forth in the Federal Travel Regulations.

(Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c))

[43 FR 28494, June 30, 1978]

PART 19-16—PROCUREMENT FORMS

Subpart 19-16.1—Forms for Advertised Supply Contracts

Sec.

19-16.102 Award documents.

19-16.104 Terms, conditions, and provisions.

Subpart 19-16.5—Forms for Advertised and Negotiated Nonpersonal Service Contracts (Other Than Construction)

19-16.501 Contract forms.

Subpart 19-16.8—Miscellaneous Forms

19-16.802 Bidder's mailing list Application.

19-16.850 Other agency forms.

19-16.851 Department of Labor forms.

19-16.851-1 Department of Labor letter and poster, PC-13 (Walsh-Healey Public Contracts Act).

19-16.851-2 Department of Labor form, PC- 16 (Walsh-Healey Public Contracts Act).

19-16.851-3 Department of Labor form, SF-99, Notice of Award of Contract.

19-16.851-4 Secretary of Labor poster, Equal Opportunity is the Law.

19-16.851-5 Department of Labor form, SC-1, Notice to Employees Working on Government Service Contracts.

19-16.860 International Communication Agency forms.

19-16.860-1 Supplemental General Provisions, IA-332.

19-16.860-2 Requisition-Purchase Order-Invoice for Professional Services, IA-44.

19-16.860-3 Memorandum of Loan, IA-431.

19-16.860-4 Bidder's Commodity and Service Code List, IA-407.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c).

SOURCE: 35 FR 19017, Dec. 16, 1970, unless otherwise noted.

Subpart 19-16.1—Forms for Advertised Supply Contracts

§ 19-16.102 Award documents.

(a) Standard Form 26 shall be used as the Agency's award document whenever Standard Form 33 is used. The award section of Standard Form 33 shall be left blank and its heading obliterated.

(b) When a narrative type contract is authorized the signature page shall serve in lieu of an award document. Copies of Standard Form 26 shall be used to provide information and instructions to appropriate Agency offices when necessary.

§ 19-16.104 Terms, conditions, and provisions.

The provisions of Agency Form, IA-332, Supplemental General Provisions are prescribed for use in all supply contracts in addition to the provisions of Standard Form 32. Form IA-332 should also be used with Standard Form 32 for service contracts when appropriate.

Subpart 19-16.5—Forms for Advertised and Negotiated Nonpersonal Service Contracts (Other Than Construction)

§ 19-16.501 Contract forms.

The forms prescribed in §§ 1-16.101 and 1-16.201 of this title for advertised and negotiated supply contracts shall be used for advertised and negotiated nonpersonal service contracts (other than construction, grant agreements, and small purchases). Narrative type contracts for nonpersonal service contracts shall be used only upon approval of the format by the Agency Contracting Officer.

Subpart 19-16.8—Miscellaneous Forms

§ 19-16.802 Bidder's mailing list application.

Whenever a Standard Form 129 is furnished to a prospective bidder, a copy of Agency Form IA-407, Bidder's Commodity and Service Code List shall also be furnished to the applicant. A copy of both forms shall be completed by the applicant and returned to the Agency.

§ 19-16.850 Other agency forms.

The forms listed in this § 19-16.850 shall be used in compliance with directives of the applicable regulatory agencies of the Government and in accordance with Chapter 1 of this title.

§ 19-16.851 Department of Labor forms.

The following forms, posters and letter posters, shall be furnished contractors in accordance with referenced regulations.

[35 FR 19017, Dec. 16, 1970, as amended at 43 FR 28494, June 30, 1978]

§ 19-16.851-1 Department of Labor letter and poster, PC-13 (Walsh-Healey Public Contracts Act).

PC-13, Department of Labor letter and poster, shall be furnished contractors, performing contract work subject to the Walsh-Healey Public Contracts Act, in accordance with § 1-12.604(b) of this title.

§ 19-16.851-2 Department of Labor form, PC-16 (Walsh-Healey Public Contracts Act).

PC-16, Department of Labor form, shall be furnished to contractors, performing contract work subject to the Walsh-Healey Public Contracts Act in accordance with § 1-12.604(c) of this title.

§ 19-16.851-3 Department of Labor form, SF-99, Notice of Award of Contract.

Standard Form 99, Notice of Award of Contract, shall be prepared and submitted to the Department of Labor, Wage and Hour and Public Contracts Division, when contract is subject to the Walsh-Healey Public Contracts Act in accordance with § 1-12.604(d) of this title or subject to the Service Contract Act of 1965 and the provisions of the Fair Labor Standards Act of 1938, in accordance with § 1-12.905-6 of this title.

§ 19-16.851-4 Secretary of Labor poster, Equal Opportunity is the Law.

Equal Opportunity is the Law, a Secretary of Labor Notice, shall be fur-

nished contractors, subject to Executive Order No. 11246, Executive Order No. 11375 and the rules and regulations of the Secretary of Labor, in accordance with § 1-12.805.3 of this title.

§ 19-16.851-5 Department of Labor form, SC-1 Notice to Employees Working on Government Service Contracts.

SC-1, Department of Labor form, shall be furnished contractors performing contract work subject to the Service Contract Act of 1965, in accordance with § 1-12.905-1 of this title.

§ 19-16.860 International Communication Agency forms.

This section prescribes International Communication Agency forms to be used in addition to the standard forms prescribed in Chapter 1, Part 16, of this title in the procurement of supplies and services.

§ 19-16.860-1 Supplemental General Provisions, IA-332.

Supplemental General Provisions, IA-332, shall be used in contracts which incorporate Standard Form 32, in accordance with § 19-16.104.

§ 19-16.860-2 Requisition-Purchase Order-Invoice for Professional Services, IA-44.

Form IA-44 is prescribed for use by media purchasing activities for the procurement of professional (talent vendor) services related to the translation or narration of colloquial speech in foreign languages. Clearances of vendors in accordance with Section 430, Part VIII, Manual of Operation and Administration shall be obtained prior to procuring such services.

§ 19-16.860-3 Memorandum of Loan, IA-431.

Form IA-431 is prescribed for use to obtain the loan of items from private owners, business firms, and nonprofit institutions for use in the Agency's exhibit program.

§ 19-16.860-4 Bidder's Commodity and Service Code List, IA-407.

Form IA-407 is prescribed for use in conjunction with Standard Form 129, Bidder's Mailing List Application, in accordance with § 19-16.802.

[35 FR 19017, Dec. 16, 1970. Redesignated at 43 FR 28494, June 30, 1978]

PART 19-60—DISPUTES AND APPEALS

Sec.

19-60.000 Scope of part.

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19-60.401 Adoption of the rules of the ASBCA.
19-60.402 Amendment to rules for Agency application.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c).

SOURCE: 34 FR 7905, May 20, 1969, unless otherwise noted.

§ 19-60.000 Scope of part.

This part sets forth procedures governing the determination of disputes arising from Agency contracts and the delegation of authority to the Armed Services Board of Contract Appeals (referred to in this part as the "ASBCA") to hear and decide appeals of contractors from final decisions of contracting officers arising under disputes provisions of contracts awarded by the International Communication Agency and the rules applicable to such appeals.

Subpart 19-60.1—Disputes

§ 19-60.100 Scope of subpart.

This subpart sets forth the policy and procedures pertaining to disputes arising under contracts, the review of available facts pertinent to the dis-

pute, and the rendering of a final decision thereon by the contracting officer.

§ 19-60.101 General.

Unless otherwise specified in a contract, any dispute concerning a question of fact under a contract shall be decided by the contracting officer who shall reduce his/her decision to writing and mail by certified mail, return receipt requested, or otherwise furnish a copy to the contractor.

§ 19-60.102 Determination of issues.

Before making a decision, the contracting officer shall consider all oral and written arguments or evidence as the contractor may present in support of his/her claim. He/she shall conduct such investigation as may be necessary to ascertain the facts. Based upon his/her review of all available facts and advice of legal counsel, he/she shall endeavor to resolve by mutual agreement a satisfactory settlement of the dispute. When questions are settled in this manner, an agreement shall be drawn up in the form of a letter or memorandum for the official records.

§ 19-60.103 Decision of the contracting officer.

When an agreement cannot be successfully negotiated, the contracting officer with the advice and assistance of the Office of the General Counsel shall render a decision in accordance with the disputes clause of the contract. The decision shall include a statement of the facts under dispute, a statement of the contractor's claim, a statement of the facts upon which the parties agree or disagree, a statement of the contracting officer's final decision, and a statement advising the contractor that decisions on disputed questions of fact and on other questions that are subject to the procedure of the disputes clause of the contract may be appealed in accordance with the provisions of that clause. The decision shall further advise the contractor that appeals must be in writing (in triplicate) and must be mailed or otherwise furnished the contracting officer within the time provided in the disputes clause of the contract or if none is designated within thirty days from the date of receipt of the final decision. See § 1-1.318. The decision will also advise the contractor that the Armed Services Board of Contract Appeals has been designated the authorized representative of the Director for the hearing of such appeals and that the regulations herein recited shall be applicable with regard to the procedure of such appeals before the Board.

Subpart 19-60.2—Appeals

§ 19-60.201 General.

An appeal to the ASBCA may be taken from the decision of a contracting officer rendered in connection with disputed questions of fact under contracts when the terms of the contract provide for the determination of such appeals by the Director or his/her duly authorized representative. When the express terms of the contract provide otherwise, appeals shall be taken in the manner provided.

§ 19-60.202 Processing appeals.

Appeals shall be prepared and submitted as set forth in the Preliminary Procedures, Part 2, Rules of the ASBCA, Appendix A to the Armed Services Procurement Regulations.

Subpart 19-60.3—Board of Contract Appeals

§ 19-60.301 Designation of authorized representative.

The Armed Services Board of Contract Appeals has been designated the authorized representative of the Director of the International Communication Agency to hear, consider, and determine appeals by contractors from final decisions of contracting officers on disputed questions arising under agency contracts pursuant to provisions of contracts requiring the determination of such appeals by the Director or his/her authorized representative.

§ 19-60.302 Agency support.

The office of the General Counsel shall ensure support by officers and employees of the Agency in processing appeals and ascertaining information

to the extent required by the ASBCA and is authorized to require such officers and employees to cooperate in such support.

Subpart 19-60.4—Rules

§ 19-60.401 Adoption of the Rules of the ASBCA.

In acting under this designation, the ASBCA is authorized to follow the rules contained in Appendix A to the Armed Services Procurement Regulations, Title 32 Code of Federal Regulations 30.1, which are hereby adopted as amended.

§ 19-60.402 Amendment to rules for Agency application.

The following amendments to Part 2—Rules of the ASBCA shall be effective whenever such rules pertain to appeals arising from Agency contracts.

(a) Preface to rules of the Armed Services Board of Contract Appeals (Summary of Pertinent Charter Provisions) delete all references to the Secretary of Defense and the Secretaries of the Military Departments and substitute therefor the words "Director, International Communication Agency."

(b) Preface to rules of the Armed Services Board of Contract Appeals (Summary of Pertinent Charter Provisions) delete in its entirety the third paragraph pertaining to the requirement of the Secretary of Defense or the Secretary of a Military Department to personally render a decision on a matter in dispute based on findings and recommendations submitted by the ASBCA.

(c) Preliminary procedures, paragraph 3 (Forwarding Appeals)—after the word "Board" at the end of the first sentence, insert a comma in lieu of the period and add immediately thereafter the words "through the Office of the General Counsel, International Communication Agency."

(d) Preliminary procedures, paragraph 4 (Duties of the Contracting Officer)—delete the words "and to the Government Trial Attorney" and add in lieu thereof the words "through the Office of the General Counsel, International Communication Agency."

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CHAPTER 20—NUCLEAR REGULATORY COMMISSION

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PART 20–1—GENERAL

Subpart 20–1.54—Contractor Organizational Conflicts of Interest

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AUTHORITY: Sec. 8, Pub. L. 95–601, adding sec. 170A to Pub. L. 83–703, 68 Stat. 919, as amended (42 U.S.C. ch. 14).

SOURCE: 44 FR 19198, Apr. 2, 1979, unless otherwise noted.

§ 20–1.5401 Scope and policy.

(a) It is the policy of the U.S. Nuclear Regulatory Commission (NRC) to avoid, eliminate or neutralize contractor organizational conflicts of interest. The NRC achieves this objective by requiring all prospective contractors to submit information describing relationships, if any, with organizations or persons (including those regulated by NRC) which may give rise to actual or potential conflicts of interest in the event of contract award.

(b) Contractor conflict of interest determinations cannot be made automatically or routinely; the application of sound judgment on virtually a case-by-case basis is necessary if the policy is to be applied so as to satisfy the overall public interest. It is not possible to prescribe in advance a specific method or set of criteria which would serve to identify and resolve all of the contractor conflict of interest situations which might arise; however, examples are provided in these regulations to guide application of the policy. NRC contracting and program officials must be alert to other situations which may warrant application of this policy guidance. The ultimate test is: Might the contractor, if awarded the contract, be placed in a position where its judgment may be biased, or where it may have an unfair competitive advantage?

(c) The conflict of interest rule contained in this subpart applies to contractors and offerors only. Individuals or firms who have other relationships with NRC (e.g., parties to a licensing proceeding) are not covered by this regulation. This rule does not apply to the acquisition of consulting services through the personnel appointment process, NRC agreements with other government agencies, international organizations, or state, local or foreign governments; separate procedures for avoiding conflicts of interest will be employed in such agreements, as appropriate.

§ 20–1.5402 Definitions.

(a) "Organizational conflicts of interest" means that a relationship exists whereby a contractor or prospective contractor has present or planned interests related to the work to be performed under an NRC contract which: (1) May diminish its capacity to give impartial, technically sound, objective assistance and advice or may otherwise result in a biased work product, or (2) may result in its being given an unfair competitive advantage.

(b) "Research" means any scientific or technical work involving theoretical analysis, exploration, or experimentation.

(c) "Evaluation activities" means any effort involving the appraisal of a technology, process, product, or policy.

(d) "Technical consulting and management support services" means internal assistance to a component of the NRC in the formulation or administration of its programs, projects, or policies which normally require the contractor to be given access to information which has not been made available to the public or proprietary information. Such services typically include assistance in the preparation of program plans; and preparation of preliminary designs, specifications, or statements of work.

(e) "Contract" means any contract, agreement, or other arrangement with the NRC except as provided in § 20–1.5401(c).

(f) "Contractor" means any person, firm, unincorporated association, joint venture, co-sponsor, partnership, corporation, affiliates thereof, or their successors in interest, including their chief executives, directors, key personnel (identified in the contract), proposed consultants or subcontractors, which is a party to a contract with the NRC.

(g) "Affiliates" means business concerns which are affiliates of each other when either directly or indirectly one concern or individual controls or has the power to control another, or when a third party controls or has the power to control both (41 CFR 1-1.606-1(e)).

(h) "Subcontractor" means any subcontractor of any tier which performs work under a contract with the NRC except subcontracts for supplies and subcontracts in amounts of $10,000 or less.

(i) "Prospective contractor" or "offeror" means any person, firm, unincorporated association, joint venture, partnership, corporation, or affiliates thereof, including its chief executive, directors, key personnel (identified in the proposal), proposed consultants, or subcontractors, submitting a bid or proposal, solicited or unsolicited, to the NRC to obtain a contract.

(j) "Potential conflict of interest" means that a factual situation exists that suggests (indicates) that an actual conflict of interest may arise from award of a proposed contract. The term "potential conflict of interest" is used to signify those situations which merit investigation prior to contract award in order to ascertain whether award would give rise to an actual conflict or which must be reported to the contracting officer for investigation if they arise during contract performance.

§ 20-1.5403 Criteria for recognizing contractor organizational conflicts of interest.

(a) General. Two questions will be asked in determining whether actual or potential organizational conflicts of interest exist: (1) Are there conflicting roles which might bias a contractor's judgment in relation to its work for the NRC? (2) May the contractor be given an unfair competitive advantage based on the performance of the contract? The ultimate determination by NRC as to whether organizational conflicts of interest exist will be made in light of common sense and good business judgment based upon the relevant facts disclosed and the work to be performed. While it is difficult to identify and to prescribe in advance a specific method for avoiding all of the various situations or relationships which might involve potential organizational conflicts of interest, NRC personnel will pay particular attention to proposed contractual requirements which call for the rendering of advice, consultation or evaluation activities, or similar activities that lay direct groundwork for the NRC's decisions on regulatory activities, future procurements, and research programs.

(b) Situations or relationships which may give rise to organizational conflicts of interest. (1) The offeror or contractor shall disclose information concerning relationships which may give rise to organizational conflicts of interest under the following circumstances:

(i) Where the offeror or contractor provides advice and recommendations to the NRC in a technical area in which it is also providing consulting assistance in the same area to any organization regulated by the NRC.

(ii) Where the offeror or contractor provides advice to the NRC on the same or similar matter in which it is also providing assistance to any organization regulated by the NRC.

(iii) Where the offeror or contractor evaluates its own products or services, or the products or services of another entity where the offeror or contractor has been substantially involved in their development or marketing.

(iv) Where the award of a contract would otherwise result in placing the offeror or contractor in a conflicting role in which its judgment may be biased in relation to its work for the NRC or may otherwise result in an unfair competitive advantage for the offeror or contractor.

(2) The contracting officer may request specific information from an offeror or contractor or may require special contract provisions such as pro-

vided in § 20–1.5405–2 in the following circumstances:

(i) Where the offeror or contractor prepares specifications which are to be used in competitive procurements of products or services covered by such specifications.

(ii) Where the offeror or contractor prepares plans for specific approaches or methodologies that are to be incorporated into competitive procurements using such approaches or methodologies.

(iii) Where the offeror or contractor is granted access to information not available to the public concerning NRC plans, policies, or programs which could form the basis for a later procurement action.

(iv) Where the offeror or contractor is granted access to proprietary information of its competitors.

(v) Where the award of a contract might otherwise result in placing the offeror or contractor in a conflicting role in which its judgment may be biased in relation to its work for the NRC or may otherwise result in an unfair competitive advantage for the offeror or contractor.

(c) Policy application guidance. The following examples are illustrative only and are not intended to identify and resolve all contractor organizational conflict of interest situations.

(1) Example. The XYZ Corp., in response to a request for proposal (RFP), proposes to undertake certain analyses of a reactor component as called for in the RFP. The XYZ Corp. is one of several companies considered to be technically well qualified. In response to the inquiry in the RFP, the XYZ Corp. advises that it is currently performing similar analyses for the reactor manufacturer.

Guidance. An NRC contract for that particular work normally would not be awarded to the XYZ Corp. because it would be placed in a position in which its judgment could be biased in relationship to its work for NRC. Since there are other well-qualified companies available, there would be no reason for considering a waiver of the policy.

(2) Example. The ABC Corp., in response to a RFP, proposes to perform certain analyses of a reactor component which are unique to one type of advanced reactor. As is the case with other technically qualified companies responding to the RFP, the ABC Corp. is performing various projects for several different utility clients. None of the ABC Corp. projects have any relationship to the work called for in the RFP. Based on the NRC evaluation, the ABC Corp. is considered to be the best qualified company to perform the work outlined in the RFP.

Guidance. An NRC contract normally could be awarded to the ABC Corp. because no conflict of interest exists which would motivate bias with respect to the work. An appropriate clause would be included in the contract to preclude the ABC Corp. from subsequently contracting for work during the performance of the NRC contract with the private sector which could create a conflict. For example, ABC Corp. would be precluded from the performance of similar work for the company developing the advanced reactor mentioned in the example.

(3) Example. As a result of operating problems in a certain type of commercial nuclear facility, it is imperative that NRC secure specific data on various operational aspects of that type of plant so as to assure adequate safety protection of the public. Only one manufacturer has extensive experience with that type of plant. Consequently, that company is the only one with whom NRC can contract which can develop and conduct the testing programs required to obtain the data in reasonable time. That company has a definite interest in any NRC decisions that might result from the data produced because those decisions affect the reactor's design and thus the company's costs.

Guidance. This situation would place the manufacturer in a role in which its judgment could be biased in relationship to its work for NRC. Since the nature of the work required is vitally important in terms of NRC's responsibilities and no reasonable alternative exists, a waiver of the policy may be warranted. Any such waiver shall be fully documented and coordinated in accordance with the waiver provisions of this policy with particular attention

to the establishment of protective mechanisms to guard against bias.

(4) Example. The ABC Co. submits a proposal for a new system for evaluating a specific reactor component's performance for the purpose of developing standards that are important to the NRC program. The ABC Co. has advised NRC that it intends to sell the new system to industry once its practicability has been demonstrated. Other companies in this business are using older systems for evaluation of the specific reactor component.

Guidance. A contract could be awarded to the ABC Co. provided that the contract stipulates that no information produced under the contract will be used in the contractor's private activities unless such information has been reported to NRC. Information which is reported to NRC by contractors will normally be disseminated by NRC to others so as to preclude an unfair competitive advantage that might otherwise accrue. When NRC furnishes information to the contractor for the performance of contract work, it shall not be used in the contractor's private activities unless such information is generally available to others. Further, the contract will stipulate that the contractor will inform the NRC contracting officer of all situations in which the information developed under the contract is proposed to be used.

(5) Example. The ABC Corp., in response to a RFP proposes to assemble a map showing certain seismological features of the Appalachian fold belt. In accordance with the representation in the RFP and § 20–1.5403(b)(1)(i), ABC Corp. informs the NRC that it is presently doing seismological studies for several utilities in the Eastern United States but none of the sites are within the geographic area contemplated by the NRC study.

Guidance. The contracting officer would normally conclude that award of a contract would not place ABC Corp. in a conflicting role where its judgment might be biased. The work for others clause of § 20–1.5405–1(c) would preclude ABC Corp. from accepting work during the term of the NRC contract which could create a conflict of interest.

(d) Other considerations. (1) The fact that the NRC can identify and later avoid, eliminate, or neutralize any potential organizational conflicts arising from the performance of a contract is not relevant to a determination of the existence of such conflicts prior to the award of a contract.

(2) It is not relevant that the contractor has the professional reputation of being able to resist temptations which arise from organizational conflicts of interest, or that a follow-on procurement is not involved, or that a contract is awarded on a competitive or a sole source basis.

§ 20–1.5404 Representation.

(a) The following procedures are designed to assist the NRC contracting officer in determining whether situations or relationships exist which may constitute organizational conflicts of interest with respect to a particular offeror or contractor.

(b) Representation procedure. The following organizational conflicts of interest representation provision shall be included in all solicitations and unsolicited proposals for:

(1) Evaluation services or activities;

(2) Technical consulting and management support services;

(3) Research; and

(4) Other contractual situations where special organizational conflicts of interest provisions are noted in the solicitation and would be included in the resulting contract. This representation requirement shall also apply to all modifications for additional effort under the contract except those issued under the "changes" clause. Where, however, a statement of the type required by the organizational conflicts of interest representation provision has previously been submitted with regard to the contract being modified, only an updating of such statement shall be required.

ORGANIZATIONAL CONFLICTS OF INTEREST REPRESENTATION

I represent to the best of my knowledge and belief that:

The award to ———— of a contract or the modification of an existing contract does ( ) or does not ( ) involve situations or relationships of the type set forth in 41 CFR § 20-1.5403(b)(1).

(c) Instructions to offerors. The following shall be included in all NRC solicitations: (1) If the representation as completed indicates that situations or relationships of the type set forth in 41 CFR 20-1.5403(b)(1) are involved, or the contracting officer otherwise determines that potential organizational conflicts exist, the offeror shall provide a statement in writing which describes in a concise manner all relevant facts bearing on his representation to the contracting officer. If the contracting officer determines that organizational conflicts exist, the following actions may be taken: (i) Impose appropriate conditions which avoid such conflicts, (ii) disqualify the offeror, or (iii) determine that it is otherwise in the best interest of the United States to seek award of the contract under the waiver provisions of § 20-1.5411.

(2) The refusal to provide the representation required by § 20-1.5404(b) or upon request of the contracting officer the facts required by § 20-1.5404(c), shall result in disqualification of the offeror for award. The nondisclosure or misrepresentation of any relevant interest may also result in the disqualification of the offeror for award; or if such nondisclosure or misrepresentation is discovered after award, the resulting contract may be terminated. The offeror may also be disqualified from subsequent related NRC contracts and be subject to such other remedial actions provided by law or the resulting contract.

(d) The offeror may, because of actual or potential organizational conflicts of interest, propose to exclude specific kinds of work from the statements of work contained in a RFP unless the RFP specifically prohibits such exclusion. Any such proposed exclusion by an offeror will be considered by the NRC in the evaluation of proposals. If the NRC considers the proposed excluded work to be an essential or integral part of the required work and its exclusion would work to the detriment of the competitive posture of the other offerors, the proposal must be rejected as unacceptable.

(e) The offeror's failure to execute the representation required by paragraph (b) of this section with respect to invitation for bids will be considered to be a minor informality, and the offeror will be permitted to correct the omission.

§ 20-1.5405 Contract clauses.

§ 20-1.5405-1 General contract clause.

All contracts of the types set forth in § 20-1.5404(b) shall include the following clauses:

(a) *Purpose.* The primary purpose of this clause is to aid in ensuring that the contractor: (1) Is not placed in a conflicting role because of current or planned interest (financial, contractual, organizational, or otherwise) which relate to the work under this contract, and (2) does not obtain an unfair competitive advantage over other parties by virtue of its performance of this contract.

(b) *Scope.* The restrictions described herein shall apply to performance or participation by the contractor as defined in 41 CFR § 20-1.5402(f) in the activities covered by this clause.

(c) *Work for others.* Notwithstanding any other provision of this contract, during the term of this contract, the contractor agrees to forgo entering into consulting or other contractual arrangements with any firm or organization, the result of which may give rise to a conflict of interest with respect to the work being performed under this contract. The contractor shall ensure that all employees who are employed full time under this contract and employees designated as key personnel, if any, under this contract abide by the provision of this clause. If the contractor believes with respect to itself or any such employee that any proposed consultant or other contractual arrangement with any firm or organization may involve a potential conflict of interest, the contractor shall obtain the written approval of the contracting officer prior to execution of such contractual arrangement.

(d) *Disclosure after award.* (1) The contractor warrants that to the best of its knowledge and belief and except as otherwise set forth in this contract, it does not have any organizational conflicts of interest, as defined in 41 CFR 20-1.5402(a).

(2) The contractor agrees that if after award it discovers organizational conflicts of interest with respect to this contract, it shall make an immediate and full disclosure in writing to the contracting officer. This statement shall include a description of the

action which the contractor has taken or proposes to take to avoid or mitigate such conflicts. The NRC may, however, terminate the contract for convenience if it deems such termination to be in the best interests of the government.

(e) *Access to and use of information.* (1) If the contractor in the performance of this contract obtains access to information, such as NRC plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (Pub. L. 93-579), or data which has not been released to the public, the contractor agrees not to: (i) Use such information for any private purpose until the information has been released to the public; (ii) compete for work for the Commission based on such information for a period of six (6) months after either the completion of this contract or the release of such information to the public, whichever is first, (iii) submit an unsolicited proposal to the government based on such information until one year after the release of such information to the public, or (iv) release the information without prior written approval by the contracting officer unless such information has previously been released to the public by the NRC.

(2) In addition, the contractor agrees that to the extent it receives or is given access to proprietary data, data protected by the Privacy Act of 1974 (Pub. L. 93-579), or other confidential or privileged technical, business, or financial information under this contract, the contractor shall treat such information in accordance with restrictions placed on use of the information.

(3) The contractor shall have, subject to patent and security provisions of this contract, the right to use technical data it produces under this contract for private purposes provided that all requirements of this contract have been met.

(f) *Subcontracts.* Except as provided in 41 CFR 20-1.5402(h), the contractor shall include this clause, including this paragraph, in subcontracts of any tier. The terms "contract," "contractor," and "contracting officer," shall be appropriately modified to preserve the government's rights.

(g) *Remedies.* For breach of any of the above proscriptions or for intentional nondisclosure or misrepresentation of any relevant interest required to be disclosed concerning this contract or for such erroneous representations as necessarily imply bad faith, the government may terminate the contract for default, disqualify the contractor from subsequent contractual efforts, and pursue other remedies as may be permitted by law or this contract.

(h) *Waiver.* A request for waiver under this clause shall be directed in writing through the contracting officer to the Executive Director for Operations (EDO) in accordance with the procedures outlined in § 20-1.5411.

20-1.5405-2 Special contract provisions.

(a) If it is determined from the nature of the proposed contract that organizational conflicts of interest exist, the contracting officer may determine that such conflict can be avoided or after obtaining a waiver in accordance with § 20-1.5411, neutralized through the use of an appropriate special contract provision. If appropriate, the offeror may negotiate the terms and conditions of these clauses, including the extent and time period of any such restriction. These provisions include but are not limited to:

(1) Hardware exclusion clauses which prohibit the acceptance of production contracts following a related nonproduction contract previously performed by the contractor;

(2) Software exclusion clauses;

(3) Clauses which require the contractor (and certain of his key personnel) to avoid certain organizational conflicts of interest; and

(4) Clauses which provide for protection of confidential data and guard against its unauthorized use.

(b) The following additional contract clause may be included as section (i) in the clause set forth in § 20-1.5405-1 when it is determined that award of a follow-on contract would constitute an organizational conflict of interest.

(i) Follow-on effort. (1) The contractor shall be ineligible to participate in NRC contracts, subcontracts, or proposals therefor (solicited or unsolicited) which stem directly from the contractor's performance of work under this contract. Furthermore, unless so directed in writing by the contracting officer, the contractor shall not perform any technical consulting or management support services work or evaluation activities under this contract on any of its products or services or the products or services of another firm if the contractor has been substantially involved in the development or marketing of such products or services.

(2) If the contractor under this contract prepares a complete or essentially complete statement of work or specifications, the contractor shall be ineligible to perform or participate in the initial contractual effort which is based on such statement of work or specifications. The contractor shall not incorporate its products or services in such

statement of work or specifications unless so directed in writing by the contracting officer, in which case the restriction in this subparagraph shall not apply.

(3) Nothing in this paragraph shall preclude the contractor from offering or selling its standard commercial items to the government.

§ 20–1.5406 Evaluation, findings, and contract award.

The contracting officer will evaluate all relevant facts submitted by an offeror pursuant to the representation requirements of § 20–1.5404(b) and other relevant information. After evaluating this information against the criteria of § 20–1.5403, a finding will be made by the contracting officer whether organizational conflicts of interest exist with respect to a particular offeror. If it has been determined that conflicts of interest exist, then the contracting officer shall either:

(a) Disqualify the offeror from award,

(b) Avoid or eliminate such conflicts by appropriate measures; or

(c) Award the contract under the waiver provision of § 20–1.5411.

§ 20–1.5407 Conflicts identified after award.

If potential organizational conflicts of interest are identified after award with respect to a particular contractor, the contracting office determines that such conflicts do, in fact, exist and that it would not be in the best interests of the government to terminate the contract as provided in the clauses required by § 20–1.5405, the contracting officer will take every reasonable action to avoid, eliminate, or, after obtaining a waiver in accordance with § 20–1.5411, neutralize the effects of the identified conflict.

§§ 20–1.5408—20–1.5409 [Reserved]

§ 20–1.5410 Subcontracts.

The contracting officer shall require offerors and contractors to submit a representation statement in accordance with § 20–1.5404(b) from subcontractors and consultants. The contracting officer shall require the contractor to include contract clauses in accordance with § 20–1.5405 in consultant agreements or subcontracts involving performance of work under a prime contract covered by this subsection.

§ 20–1.5411 Waiver.

(a) In the first instance, determination with respect to the need to seek a waiver for specific contract awards shall be made by the contracting officer with the advice and concurrence of the program office director and the Office of Executive Legal Director. Upon the recommendation of the contracting officer, and after consultation with the Office of the General Counsel, the EDO may waive the policy in specific cases if he determines that it is in the best interest of the United States to do so.

(b) Such action shall be strictly limited to those situations in which: (1) The work to be performed under contract is vital to the NRC program; (2) the work cannot be satisfactorily performed except by a contractor whose interests give rise to a question of conflict of interest; and (3) contractual and/or technical review and supervision methods can be employed by NRC to neutralize the conflict. For any such waivers, the justification and approval documents shall be placed in the Public Document Room.

§ 20–1.5412 Remedies.

In addition to such other remedies as may be permitted by law or contract for a breach of the restrictions in this subpart or for any intentional misrepresentation or intentional nondisclosure of any relevant interest required to be provided for this section, the NRC may debar the contractor from subsequent NRC contracts.

CHAPTER 22—COMMUNITY SERVICES ADMINISTRATION—[RESERVED]

EDITORIAL NOTE: The Community Services Administration was terminated, effective September 30, 1981. For a document detailing the transfer of functions, see 46 FR 49211, Oct. 6, 1981.

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PART 23–1—GENERAL

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AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); secs. 31 and 41, 75 Stat. 631, 22 U.S.C. 2571 and 2581.

SOURCE: 33 FR 19226, Dec. 24, 1968, unless otherwise noted.

§ 23–1.000 Scope of part.

This part describes the method by which the U.S. Arms Control and Disarmament Agency implements and supplements the Federal Procurement Regulations, and contains procedures which implement and supplement Part 1–1 of the Federal Procurement Regulations.

Subpart 23–1.1—Introduction

§ 23–1.100 Scope of subpart.

This subpart establishes Chapter 23 of the Federal Procurement Regulations System, and states its relationship to the Federal Procurement Regulations (FPR), and to other instructions governing contracting and procurement operations of the U.S. Arms Control and Disarmament Agency (ACDA).

§ 23–1.101 Establishment of ACDA procurement regulations.

This subpart establishes the U.S. Arms Control and Disarmament Agency Procurement Regulations (ACDAPR), as prescribed by the Director of the Agency for the procurement of personal property and services (including construction) and the procurement of real property by lease. Section 31 of the Arms Control and Disarmament Act (22 U.S.C. 2571) authorizes and directs the Director of the Agency to exercise his powers in such a manner as to insure the acquisition of a fund of theoretical and practical knowledge concerning disarmament. To this end the Director is authorized and directed, under the direction of the President, to insure the conduct of research, development, and other studies in the field of arms control and disarmament, and to make arrangements (including contracts, agreements, and grants) for the conduct of research, development, and other studies in the field of arms control and disarmament by U.S. private or public institutions or persons. Limitations on the scope of the Director's authority are specified in section 31 of the Act.

§ 23-1.102 Relationship of ACDAPR Chapter 23 to the FPR.

(a) Chapter 23 implements and supplements the FPR. Material published in the FPR, which has Government-wide applicability, becomes effective within ACDA upon the mandatory effective date of the particular FPR material.

(b) Implementing material is that which expands upon related FPR material. It will treat a similarly numbered portion of the FPR in greater detail or indicate the manner of compliance or deviation.

(c) Supplemental material is that for which there is no counterpart in the FPR.

(d) The absence of a corresponding part, subpart, and section in Chapter 23 indicates that the FPR is applicable as written.

§ 23-1.103 Authority.

The U.S. Arms Control and Disarmament Agency Procurement Regulations are prescribed by the Director of the Agency pursuant to the Arms Control and Disarmament Act, and the Federal Property and Administrative Services Act of 1949, as amended.

§ 23-1.104 Applicability.

Chapter 23 applies to all contracts for the procurement of personal property and services (including construction) and the procurement of real property by lease, with U.S. private or public institutions and persons. Unless otherwise specifically stated, Chapter 23 does not apply to grants.

§ 23-1.105 Exclusions.

Certain ACDA policies and procedures within the scope of Chapter 23 may nevertheless be excluded when authorized by the Director. These exclusions include the following categories:

(a) Subject matter which bears a security classification.

(b) Policies or procedures which are expected to be effective for a period of less than 6 months.

(c) Policies or procedures which are being instituted on an experimental basis for a reasonable period.

(d) Where speed of issuance is essential, and numerous changes in this Chapter 23 cannot be made promptly. These will be codified in Chapter 23 at the earliest practicable date, and in any event not later than 6 months from date of issuance.

§ 23-1.106 Issuance.

§ 23-1.106-1 Code arrangement.

Chapter 23 material published in the FEDERAL REGISTER will be published in cumulative form in Chapter 23 of Title 41 of the Code of Federal Regulations.

§ 23-1.106-2 Publication.

All Chapter 23 material considered necessary or desirable for an understanding of basic and significant ACDA procurement policies and procedures by business organizations and other organizations or individuals interested in furnishing property or services to ACDA will be published in the FEDERAL REGISTER. Detailed instructions of interest primarily for internal agency guidance shall not be published.

§ 23-1.106-3 Copies.

The FEDERAL REGISTER and Title 41 of the Code of Federal Regulations may be purchased from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

§ 23-1.107 Arrangement.

§ 23-1.107-1 General plan.

The U.S. Arms Control and Disarmament Agency Procurement Regulations (ACDAPR) employ the same numbering system and nomenclature as the Federal Procurement Regulations and conform with FEDERAL REGISTER standards approved for the FPR.

§ 23-1.107-2 Numbering.

(a) This Chapter 23 has been allocated to the U.S. Arms Control and Disarmament Agency for implementing, supplementing and deviating from the Federal Procurement Regulations appearing as Chapter 1 of this Title 41 of the Code of Federal Regulations.

(b) Where Chapter 23 implements, or deviates from, a part, subpart, section, or subsection of the FPR, the im-

plementing or deviating part, subpart, section, or subsection of Chapter 23 will be numbered and captioned to correspond to the pertinent part, subpart, section, or subsection of the FPR.

(c) Where Chapter 23 supplements the FPR, numbers in the group 50 to 99 will be assigned to the respective supplementing part, subpart, or section.

(d) Where the Agency determines that the subject matter contained in a part, subpart, section, or subsection of the FPR requires no implementation, the ACDAPR will contain no corresponding part, subpart, section, or subsection number and the subject matter as published in the FPR governs.

§ 23-1.107-3 Citation.

ACDA procurement regulations will be cited in accordance with FEDERAL REGISTER standards approved for the FPR. Thus, the section, when referred to in divisions of the ACDAPR, should be cited as "§ 23-1.107-3 of this chapter." When this section is referred to formally in official documents, such as legal briefs, it should be cited as "41 CFR 23-1.107-3". Any section of the ACDA Procurement Regulations may be informally identified, for purposes of brevity, as ACDAPR followed by the section number, e.g., "ACDAPR 23-1.107-3".

§ 23-1.108 [Reserved]

§ 23-1.109 Deviation.

Deviation from the Federal Procurement Regulations and the ACDA Procurement Regulations shall be kept to a minimum and controlled as follows:

(a) Deviations in individual cases must be approved in advance by the Executive Director. This authority may not be redelegated. Deviations in classes of cases must be approved in advance upon request by the Executive Director. Requests for deviation (or in the case of a deviation affecting an individual contract signed in behalf of the Agency by the Executive Director, the memorandum for the record) shall cite the specific parts and sections or subsections of the FPR and ACDAPR from which it is desired to deviate, shall set forth the nature of the deviation, and shall give the reasons for the requested action.

(b) If a requested deviation is considered appropriate, approval will be accomplished as follows:

(1) Where the deviation affects an individual contract, written approval will be included in the contract file.

(2) Where the deviation applies to a class of cases under the FPR, necessary coordination with the General Services Administration will be accomplished on an expedited basis by the Executive Director, unless in the considered judgment of the Executive Director, circumstances preclude such joint effort, in which case he will notify the General Services Administration of the deviation.

(3) Deviations affecting a class of cases under ACDAPR will be presented to the Director for his approval.

(4) Such class deviations will become effective within the Agency upon approval by the Director and will be issued as part of the ACDAPR.

Subpart 23-1.2—Definition of Terms

§ 23-1.201 Definitions.

For the purposes of this chapter, the following terms have the meanings set forth in this subpart, unless otherwise indicated.

§ 23-1.204 Head of the Agency.

The "head of the agency" means the Director or Acting Director of the U.S. Arms Control and Disarmament Agency.

§ 23-1.205 Procuring activity.

The organizational element of ACDA which has responsibility to contract for the procurement of personal property and services (including construction) and the acqusition of real property by lease is the Office of the Executive Director.

§ 23-1.206 Head of the procuring activity.

The "head of the procuring activity" within ACDA is the Executive Director.

§ 23-1.250 ACDA.

"ACDA" means the U.S. Arms Control and Disarmament Agency.

§ 23-1.251 Agency.

"Agency" means the U.S. Arms Control and Disarmament Agency.

§ 23-1.252 Director.

"Director" means the head of the Agency.

Subpart 23-1.3—General Policies

§ 23-1.302 Procurement sources.

§ 23-1.302-3 Contracts between the Government and Government employees or business concerns substantially owned or controlled by Government employees.

Any exception, as described in § 1-1.302-3 of this title, must be supported by written findings and a determination signed by the Director.

§ 23-1.317 Noncollusive bids and proposals.

The Executive Director is designated to make the determinations described in paragraph (d) of the Certificate of Independent Price Determination prescribed in § 1-1.317 of this title.

§ 23-1.350 Execution of contracts.

Contracts, purchase orders, delivery orders, Government bills of lading, and other types of purchasing documents will be executed only by the Executive Director, the Chief of the Contracts Branch, or Contract Specialists acting within the scope of their delegated authority (See Part 23-51). They may also be executed by other officials holding valid written delegations or redelegations or procurement authority issued by the Director or other officer of the Agency designated by the Director in writing to make such delegations or redelegations. The approval of legal counsel as to form and legality will be required for contracts, and for other contractual instruments where specific legal questions arise.

§ 23-1.352 Fraud against the Government and other violations of law.

(a) In the event procurement personnel have reason to believe there exists evidence of fraud against the Government or any other violation of law of any nature whatsoever in the procurement by formal advertising or by negotiation, or during the performance of any contract, they will prepare and forward a complete report through the Executive Director to the Office of the General Counsel for appropriate action.

(b) In case of possible violation of the antitrust laws, the report will be prepared in accordance with Subpart 1-1.9 of this title.

Subpart 23-1.4—Procurement Authority and Responsibility

§ 23-1.402 Authority of contracting officers.

(a) An employee binds the Government only when his actions are in accordance with authority actually granted to him. Contracting officers are agents of the Government and shall act in accordance with law, regulations including FPR and ACDAPR, other pertinent directives, and sound judgment, and within the limits of their prescribed duties and authorities.

(b) Contracting officers shall personally sign all contracts and modifications entered into by them (see § 23-1.104). Duplicate original signatures, including facsimile signatures reproduced from a master signed manually by the contracting officer, are valid and acceptable.

§ 23-1.404-2 Designation.

Delegations and redelegations of authority are generally directive on specific positions, rather than specific individuals. When a specific position carries delegated or redelegated contracting authority, an individual appointed to such a position is, therefore, a contracting officer. Such appointments are normally made by means of administrative personnel actions. When an individual is designated as a contracting officer by an instrument other than a personnel action, a copy of the designating instrument shall be forwarded to the appropriate personnel office for inclusion in the file of the individual affected.

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§ 23-1.404-3 Termination of designation.

Designations shall be rescinded in the same manner upon termination of the assignment (but special assignments may be self-rescinding, as, for example, an assignment made in terms of the life of a specific contract, in which case a separate recission instrument would not be required).

§ 23-1.450 Contracting officers' representatives.

(a) Any properly qualified Government employee or group of employees, or a firm or individual under contract to the Government for this purpose, may be designated to act as the authorized representative of a contracting officer. Such designation shall be in writing and shall define the scope and limitations of the authorized representative's authority.

(b) A designation authorized by this § 23-1.450 may be made by instructions referring to particular contractual instruments or categories of instruments and may empower the authorized representative to take specified actions thereunder within the scope of the contract. In no event shall an authorized representative, by virtue only of his designation as such, be empowered to modify the terms of the contract or make a final decision under the Disputes clause of a contract.

§ 23-1.451 Assignment of duties to contracting officers in other agencies.

A contracting officer may assign administration of a specific contractual instrument to another contracting officer, provided the assignee contracting officer's delegated authority permits, and the contractor shall be so notified. Such an assignment shall define the extent to which part or all of the original contracting officer's authority is transferred but shall not pass on to the successor any authorities which would exceed the limitations imposed on the successor by existing directives.

§ 23-1.452 Availability of funds.

No contractual obligation may be incurred until the contracting officer has satisfied himself that adequate funds are available.

PART 23-3—PROCUREMENT BY NEGOTIATION

Subpart 23-3.1—Use of Negotiation

Sec.
23-3.100 Scope of subpart.
23-3.101 General requirements for negotiation.
23-3.102 Factors to be considered during the negotiation of contracts.
23-3.103 Dissemination of procurement information.
23-3.104 Disclosure of mistakes.
23-3.150 Contractor Selection Board.
23-3.150-1 Establishment of the Board.
23-3.150-2 Evaluation of proposals.
23-3.150-3 Notification to unsuccessful offerors.
23-3.150-4 Recommendation to the Director.
23-3.150-5 Restriction on disclosure of Contractor Selection Board Reports.

Subpart 23-3.2—Circumstances Permitting Negotiation

23-3.202 Public exigency.
23-3.202-50 Application.
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Subpart 23-3.4—Types of Contracts

23-3.405 Cost-reimbursement type contracts.
23-3.405-5 Cost-plus-a-fixed-fee contract.
23-3.405-50 Cost-plus-award-fee contract.

Subpart 23-3.50—Solicitation of Proposals and Quotations

23-3.5001 Late proposals and modifications.
23-3.5002 Treatment of procurement information.
23-3.5002-1 Restrictions on disclosure and use of data in proposals and quotations.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); sec. 302, 63 Stat. 393, 41 U.S.C. 252; sec. 304, 63 Stat. 395, 41 U.S.C. 254; sec. 307, 63 Stat. 396, 41 U.S.C. 257; sec. 1, 81 Stat. 54, 5 U.S.C. 552; sec. 41, 75 Stat. 631; 22 U.S.C. 2581.

SOURCE: 33 FR 19228, Dec. 24, 1968, unless otherwise noted.

Subpart 23-3.1—Use of Negotiation

§ 23-3.100 Scope of subpart.

This subpart deals with the nature and use of negotiation as distinguished from formal advertising as a means of procurement, and with limitations on that use.

§ 23-3.101 General requirements for negotiation.

(a) Under section 31 of the Arms Control and Disarmament Act (22 U.S.C. 2571), the Director, in carrying out his responsibilities, is authorized "to make arrangements (including contracts, agreements, and grants) for the conduct of research, development, and other studies in the field of arms control and disarmament by U.S. private or public institutions or persons." This authority is initially exercised under the Federal Property and Administrative Services Act of 1949, as amended, and under the Federal Procurement Regulations issued by the General Services Administration pursuant thereto. Except under certain circumstances set forth in those regulations, Government contracts for supplies and services are required to be made only after formal advertising and competitive bidding. The purpose is to give all qualified persons an equal opportunity to compete for Government contracts; to avoid favoritism or collusion in the letting of contracts; and, most important of all, to increase the Government's chances of finding the particular organization or individual who will best supply the Government's needs for supplies or services, price, and other factors considered.

(b) For the same reasons, where formal advertising for bids is determined to be impracticable, as may be the case with Agency research contracts, the requirement for negotiated contracts resulting from competitive proposals obtains. The proposals must be obtained from all known qualified sources and the procurement opportunity synopsized to assure maximum full and free competition consistent with the needs of the Government.

(c) Accordingly, the Agency normally procures research services by sending out a request for proposals to a number of possible sources ascertained to have qualifications in the particular area of service concerned. These requests for proposals are announced in the "United States Department of Commerce Synopsis of U.S. Government Proposed Procurements, Sales, and Contract Awards," in accordance with the provisions of 15 U.S.C. 637, for the information of any potential offeror. However, certain procurements need not be so announced, such as those of a classified nature, those for services from an educational institution, and those for personal or professional services.

§ 23-3.102 Factors to be considered during the negotiation of contracts.

Among those factors to be considered in the preparation of requests for proposals is the need for auditing of the contractor's records (see Subpart 1-3.8 of this title).

§ 23-3.103 Dissemination of procurement information.

In addition to FPR requirements for publication of procurement opportunities, information on current and proposed research and study programs is available upon request.

§ 23-3.104 Disclosure of mistakes.

(a) If the contracting officer has reason to believe that an offeror has made a mistake he shall obtain verification of the proposal or quotation from the offeror.

(b) Correction of mistakes after entry into force of a contract shall be made in accordance with the provisions of § 1-2.406-4 of this title to the extent applicable. The extraordinary contractual authority established by Pub. L. 85-804 (50 U.S.C. 1431-1435) is not available to the Agency for the correction of mistakes.

§ 23-3.150 Contractor Selection Board.

§ 23-3.150-1 Establishment of the Board.

A Contractor Selection Board, whose membership is approved by the Director, is established for each prospective contract for which competitive proposals are to be solicited.

§ 23-3.150-2 Evaluation of proposals.

(a) In evaluating proposals, unless otherwise set forth in the Request for Proposal, the Board shall give primary and equal consideration to (1) the degree of initiative and imagination displayed, (2) the caliber and experience of the personnel involved, and (3) the soundness of the offeror's approach.

(b) After elimination of proposals on the basis of the foregoing, then price and other factors in relation to the work to be performed will be considered for purposes of final selection.

§ 23-3.150-3 Notification to unsuccessful offerors.

As deliberations of the Board progress and offerors are definitely eliminated from further consideration, the Chairman shall make recommendations to the Contracting Officer (and supply him with the pertinent information) with respect to the notification of unsuccessful offerors who have been eliminated from consideration.

§ 23-3.150-4 Recommendation to the Director.

After the Contractor Selection Board has completed its evaluation of all proposals received, the Board shall recommend in writing to the Director its selection of the proposed contractor to perform the work.

§ 23-3.150-5 Restriction on disclosure of Contractor Selection Board Reports.

Because of the confidential nature of information supplied by the offeror(s) and of the evaluations contained in the Contractor Selection Board's report, the report shall not be made available to the public.

Subpart 23-3.2—Circumstances Permitting Negotiation

§ 23-3.202 Public exigency.

Pursuant to section 302(c)(2) of the Federal Property and Administrative Services Act (41 U.S.C. 252(c)(2)), purchases and contracts may be negotiated if: "the public exigency will not admit of the delay incident to advertising."

§ 23-3.202-50 Application.

Examples of circumstances when use of the authority cited in § 23-3.202 may be justified include the following:

(a) Specialized studies to support elements of arms control proposals being considered urgently for international negotiations.

(b) Development or production of verification equipment urgently needed to support obligations assumed by the United States under executive agreement or treaty.

§ 23-3.204 Personal or professional services.

Pursuant to section 302(c)(4) of the Federal Property and Administrative Services Act (41 U.S.C. 252(c)(4)), purchases and contracts may be negotiated if "for personal or professional services."

§ 23-3.204-50 Application.

(a) This authority shall be used when the following conditions have been satisfied:

(1) If personal services, they are required to be performed by an individual contractor in person (not by organization or other association) and are to be performed under Government supervision and paid for on a time basis.

(2) If professional services, they may be performed either by an individual person or by an association.

(3) Procurement of the services is authorized by law and is effected in accordance with the requirements of any such law.

(b) Under section 41(d) of the Arms Control and Disarmament Act (22 U.S.C. 2581), the Agency is authorized to: Procure services of experts and consultants or organizations thereof, including stenographic reporting services, as authorized by section 15 of the Act of August 2, 1946 (5 U.S.C. 3109(b)), at rates not to exceed $100 per diem for individuals, and to pay in connection therewith travel expenses of individuals, including transportation and per diem in lieu of subsistence while away from their homes or regular places of business, as authorized by section 5 of said Act, as amended (5 U.S.C. 5703): *Provided,* That no such individual shall be employed for

more than 100 days in any fiscal year unless the President certifies that employment of such individual in excess of such number of days is necessary in the national interest: *And provided further,* That such contracts may be renewed annually;

(c) 5 U.S.C. 3109(b), in turn, provides authority to procure by contract: The temporary (not in excess of 1 year) or intermittent services of experts or consultants or an organization thereof, including stenographic reporting services.

§ 23-3.204-51 Limitations.

It is ACDA general policy to obtain personal services of experts and consultants by appointment rather than by contract. Contracts negotiated under other authority are not subject to the requirements and limitations of this § 23-3.204.

§ 23-3.206 Purchases outside the United States.

Section 31 of the Arms Control and Disarmament Act (22 U.S.C. 2571) limits the authority of the Agency to contract for the conduct of research, development, and other studies in the field of arms control and disarmament to U.S. private or public institutions or persons.

Subpart 23-3.4—Types of Contracts

§ 23-3.405 Cost-reimbursement-type contracts.

§ 23-3.405-5 Cost-plus-a-fixed-fee contract.

Unless expressly approved by the Director in the case of each contract, the fixed fee shall not exceed ten (10%) percent of the estimated cost of the contract, exclusive of fee.

§ 23-3.405-50 Cost-plus-award-fee contract.

(a) *Description.* The cost-plus-award-fee contract, is a cost-reimbursement-type contract with incentive fee provision which includes:

(1) A target cost;

(2) A base fee commensurate with minimum acceptable performance;

(3) Criteria against which the contractor's performance will be evaluated;

(4) An additional adjustment to the base fee, not to exceed a stipulated maximum, which is awarded on the basis of the subjective evaluation by ACDA of contractor performance; and

(5) Specific provision that the determination of fee adjustment shall not be subject to the contract article entitled "Disputes".

(b) *Application.* The cost-plus-award-fee contract is suitable for use when:

(1) A cost-reimbursement-type contract is found necessary or particularly pertinent;

(2) The work to be performed is such that specific quantitative or objective measurement is not feasible and effective incentive arrangements cannot be devised on the basis of cost or performance (see § 1-3.405-4 of this title);

(3) Agency procurement objectives will be advanced if the contractor is effectively motivated to exceptional performance; and

(4) Any added administrative effort and costs required to monitor and evaluate performance are justified by the anticipated benefits.

(c) *Considerations of concept.* (1) The opportunity for increase in earned fees is intended to motivate the contractor to manage effectively the required work to control costs, and to improve the timeliness, quality, and quantity of performance.

(2) The award fee should be earned by the contractor for exceptional performance, surpassing minimum acceptable levels and should be commensurate with the benefits accruing to the Agency from the contractor's performance. The contractual terms may generally obligate the contractor to devote a specified level of effort for a stated period of time to satisfy the various aspects of the scope of the work; it follows that the award of additional fee for exceptional performance in designated areas should be contingent upon an acceptable level of performance for all other contract requirements. Although determination of the amount of award fee is a unilateral one based on subjective evaluations, the decision may be aided by such quantifying devices as adjectival ratings, point systems or percentages of achievement. Ordinarily, the award

fee adjustments will be increases only, and contract arrangements for decreases in base fee (e.g., if certain criteria or levels of performance are not met) must be carefully scrutinized prior to approval for use. Such arrangement must provide that the contractor will be informed of the reasons for decrease in fee, and will be given specific opportunity to submit information on his behalf prior to decision by the official responsible for fee adjustment.

(d) *Limitations.* (1) The cost-plus-award-fee contract shall not be used (i) in procurements in which all factors affected by the incentive (e.g., cost, delivery, or performance) can be measured or objectively evaluated, or (ii) where the contract amount, term of performance or anticipated benefits are insufficient to warrant the additional administrative effort or cost.

(2) The maximum fee, comprising base fee, award fee and any other incentive fee payable under the contract may not exceed the maximum fee prescribed by law or regulation for research and development, or for supply contracts.

Subpart 23-3.50—Solicitation of Proposals and Quotations

§ 23-3.5001 Late proposals and modifications.

(a) This section shall apply only to purchases in excess of $2,500.

(b) Written requests for proposals shall contain the following provisions: Offerors using certified mail are cautioned to obtain a Receipt for Certified Mail showing a legible, dated postmark and to retain such receipt against the chance that it will be required as evidence that a late proposal was timely mailed.

(c) Proposals which are received in the office designated in the requests for proposals after the time specified for their submission are "Late Proposals". Unless a specified time for receipt of proposals is stated in the request for proposals, the time for such receipt shall be deemed to be the time for close of business of the office designated for receipt of proposals on the date stated in the request for proposals. Late proposals shall not be considered for award, except under the following circumstances:

(1) Only one proposal is received; or

(2) Under the circumstances set forth in § 1-2.303 of this title permitting consideration of late bids if proven to have been timely mailed or timely filed with the telegraph company.

(d) When it has been determined that a late proposal will not be considered for award, the offeror shall be notified promptly of the fact.

(e) Late modifications shall be subject to the rules applicable to late proposals set forth in this section. The normal revisions of proposals by selected offerors occurring during the usual conduct of negotiations with such offerors are not to be considered as late proposals or late modifications.

(f) All the provisions of this section are equally applicable to late quotations.

§ 23-3.5002 Treatment of procurement information.

§ 23-3.5002-1 Restrictions on disclosure and use of data in proposals and quotations.

(a)(1) A proposal, whether solicited or unsolicited, may include data, such as a technical design or concept of financial and management plan, which the offeror does not want disclosed to the public for any purpose or used by the Government for any purpose other than evaluation of the proposal. If an offeror wishes so to restrict his proposal, he shall mark the title page with the following legend:

> This data, furnished in connection with Request for Proposals No. ——, shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part for any purpose other than to evaluate the proposal; *Provided*, That if a contract is awarded to this offeror as a result of or in connection with the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the contract. This restriction does not limit the Government's right to use information contained in the data if it is obtained from another source without restriction. The data subject to this restriction is contained in Sheets ——.

If proposal is unsolicited, delete "furnished in connection with Request for Proposals No. ———".

(2) The offeror shall mark each sheet of data which he wishes to restrict with the following legend:

Use or disclosure of proposal data is subject to the restriction on the Title page of this proposal.

Contracting Officers and other Agency personnel shall not refuse to consider any proposal merely because it or the data submitted with it is so marked. Those portions of the proposal and data which are so marked (except for information which is also obtained from another source without restriction) shall be used only to evaluate the proposal and shall not be disclosed outside the Government without the written permission of the offeror. If it is desired to duplicate, use, or disclose the data of the offeror to whom the contract is to be awarded, for purposes other than to evaluate the proposal, the contract should so provide. (See Part 23-52 of this chapter for a description of "data" and, in general, for the policy, instructions, and contract clauses with respect to the acquisition and use of data.)

(b) Proposals of subcontractors which are included as part of a proposal submitted by a prime-offeror shall be marked as provided in paragraph (a) of this section if the subcontractor wishes so to restrict his proposal.

(c) The provisions in paragraphs (a) and (b) of this section are also applicable to quotations. In the case of a request for quotations, the legends in paragraph (a) of this section shall be appropriately modified.

PART 23-4—SPECIAL TYPES AND METHODS OF PROCUREMENT

Sec.

23-4.000 Scope of part.

Subpart 23-4.51—Unsolicited Proposals

23-4.5101 Definitions.
23-4.5102 Policy.
23-4.5103 Procedures.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and sec. 41, 75 Stat. 631, 22 U.S.C. 2581.

SOURCE: 33 FR 19230, Dec. 24, 1968, unless otherwse noted.

§ 23-4.000 Scope of part.

This part implements and supplements the policies and procedures set forth in Part 1-4 of the Federal Procurement Regulations.

Subpart 23-4.51—Unsolicited Proposals

§ 23-4.5101 Definitions.

An "unsolicited proposal" is a written offer to undertake research, development or studies in the field of arms control and disarmament submitted by any offeror solely on his own initiative and not in response to a specific request made by ACDA.

§ 23-4.5102 Policy.

A limited exception to the general requirement of competition in Government procurement arises in connection with unsolicited proposals. When a proposal for services has been submitted by an offeror upon his private initiative, it might not be equitable for the Agency to seek competing proposals. Because the considerations here are equitable in nature, the determinations must depend on consideration of the facts of each case and the extent to which the inequity to the proposing party is so great that the Government may be limited in the method of procurement. Several guiding principles can be stated:

(a) An unsolicited proposal must be truly unsolicited, and not the result of formal or informal requests for proposals made by Agency representatives.

(b) An unsolicited proposal should not merely anticipate a particular research project. Thus, for example, an offeror reading the Congressional report of hearings on the Agency's appropriation and quickly submitting a proposal on a project which the Agency clearly contemplated undertaking by contract during the fiscal year in question, does not meet valid criteria governing unsolicited proposals.

(c) An unsolicited proposal should represent a considerable investment of time and effort by the offeror. Thus, in order to qualify for a contract negotiated without competition, an unsolicited proposal should be an unusual, detailed, original, thoroughly developed conception of a project, which

could result in furthering the Agency's statutory responsibilities. (See § 23-3.5002-1 of this chapter for protection of proprietary data contained in proposals.)

§ 23-4.5103 Procedures.

(a) Each unsolicited proposal shall be examined in detail, the facts evaluated in light of the equities involved, and documentation of the factors considered in such evaluation retained. Contracting for research, development or studies on the basis of unsolicited proposals may be undertaken only after the following steps are taken:

(1) The designated representative of the Bureau or Office most likely to sponsor the work by reason of its responsibilities, considers, coordinates, analyzes, and evaluates the proposal.

(2) If the unsolicited proposal is deemed to be worthy of sponsorship by the Bureau or Office head, he shall submit a memorandum to the Research Council (see 22 CFR 603.14) recommending that the research should be conducted under a contract.

(3) If the Research Council approves the proposal, it is referred to the Director for his authorization of negotiation of the contract.

(b) When an unsolicited proposal has been determined to be unacceptable, the Bureau or Office head will notify the offeror in writing of this fact and the reasons therefor.

PART 23-7—CONTRACT CLAUSES

Sec.

23-7.000 Scope of part.

Subpart 23-7.1—Clauses for Fixed Price Supply Contracts

23-7.100 Scope of subpart.
23-7.102 Clauses.
23-7.102-1 Definitions.
23-7.102-2 Changes.
23-7.150 Materials.
23-7.151 Government furnished property.
23-7.152 Security.
23-7.153 Excusable delays.
23-7.154 Publication and release of information.
23-7.155 Order of precedence.

Subpart 23-7.50—Clauses for Cost-Reimbursement-Type Contracts

23-7.5000 Scope of subpart.
23-7.5001 Applicability.
23-7.5002 Clauses.
23-7.5002-1 Definitions.
23-7.5002-2 Changes.
23-7.5002-3 Limitation of cost.
23-7.5002-4 Allowable cost, fee and payment.
23-7.5002-5 Subcontracts.
23-7.5002-6 Litigation and claims.
23-7.5002-7 Publication and release of information.
23-7.5002-8 Materials.
23-7.5002-9 Government furnished property.
23-7.5002-10 Security.
23-7.5002-11 Order of precedence.

AUTHORITY: Secs. 31 and 41, 75 Stat. 631, 22 U.S.C. 2571 and 2581; and sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c).

SOURCE: 33 FR 19230, Dec. 24, 1968, unless otherwise noted.

§ 23-7.000 Scope of part.

This part sets forth contract clauses, in addition to those prescribed in Chapter 1 of this title, to be used by the U.S. Arms Control and Disarmament Agency in the procurement of personal property and services.

Subpart 23-7.1—Clauses for Fixed Price Supply Contracts

§ 23-7.100 Scope of subpart.

(a) This subpart sets forth contract clauses to be used in fixed price supply contracts and, to the extent appropriate, in fixed price contracts for research and development.

(b) As used throughout this subpart, the terms "fixed price contract" shall mean any contract (1) entered into either by formal advertising or by negotiation (other than small purchases negotiated under the authority of 41 U.S.C. 252(c)(3)); (2) for a stipulated set sum of money (with or without provision for price redetermination, escalation or other form of price revision); (3) covering the acquisition of supplies or services, or both.

§ 23-7.102 Clauses.

§ 23-7.102-1 Definitions.

(a) Clause:

DEFINITIONS

As used throughout this contract, the following terms shall have the meaning set forth below:

(a) The term "head of the Agency," "Secretary" or "Director" means the Director of the U.S. Arms Control and Disarmament Agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Director.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer, and the term includes, except as otherwise provided in this contract, the authorized representative of the Contracting Officer acting within the limits of his authority.

(c) Agency means that U.S. Arms Control and Disarmament Agency.

(d) Except as otherwise provided in this contract, the term "subcontracts" includes agreements for experts and consultants and purchase orders under this contract.

(b) Additional definitions may be included in the clause set forth in paragraph (a) of this section to the extent they are consistent with the clause of this subpart.

§ 23-7.102-2 Changes.

(a) Clause:

CHANGES

The Contracting Officer may at any time issue written directions requiring additional work or directing the omission of or variations in work covered by this contract and within the general scope thereof. If any such direction results in a change in the amount or character of the work provided for herein, an equitable adjustment shall be made in the contract price or delivery schedule (or both) and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within sixty (60) days from the date of receipt by the Contractor of the notification of change; *Provided, however,* That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as modified.

(b) In the foregoing clause the period of "sixty (60) days" within which any claim for adjustment must be asserted may be varied, but in no case may the period be for less than 30 days or for more than 120 days.

§ 23-7.150 Materials.

MATERIALS

(a) The term "Materials" as used herein includes: All writings representing the Contractor's documentary work in process, including but not limited to completed documents, working papers, drafts; all technical data (including but not limited to drawings, graphic or recorded matter) relating to uses, products, processes, patents and inventions; required for delivery to the Government under the contract. The Contractor shall identify and appropriately mark all data containing the Contractor's proprietary information which he is required to deliver to the Government under the terms of the contract.

(b) Requests for Materials to be supplied by the Agency to the Contractor shall be made to the Contracting Officer and shall specify as complete identifying information as possible concerning title, author or issuing agency, date, serial number, security classification, or administrative control, and the like. Such requests shall also explain the Contractor's need for the Materials requested. All Materials supplied by the Agency to the Contractor (either as a result of a request made by the Contractor or supplied voluntarily by the Agency) and all reproductions thereof, except as may be otherwise authorized by the Contracting Officer, shall be returned at the time of submission of the final report, or at such earlier time as the Contracting Officer may specify, directly to the source from which such Materials were received by the Contractor unless the Contractor is otherwise directed by the Contracting Officer.

(c) Upon the completion or earlier termination of this contract, the Contractor shall, except as otherwise authorized by the Contracting Officer, deliver to the Agency all Materials that bear a security classification or administrative control which the Contractor had developed or reported during the conduct of the work, including all reproductions thereof, and, unless otherwise specified by the Contracting Officer, copies of all other Materials which the Contractor has developed or reported during the conduct of the work or which the Contractor is required to deliver under other

terms of this contract. It is understood and agreed that the Agency shall have the right to determine and specify which of such Materials bear, or should bear, a security classification or administrative control. The Contractor may delete, from any Materials delivered hereunder, references which contain or disclose proprietary information to which the Government is not entitled by law or by applicable provisions of this contract.

(d) All Materials pertaining to the substance of the work and covered by this clause shall be subject to inspection by the Agency through any representative or representatives designated by the Contracting Officer, at all reasonable times, and the Contractor shall supply proper and adequate facilities for such inspections and for enabling such representative or representatives to reproduce a reasonable number of copies of such Materials.

(e) Except as otherwise authorized in writing by the Contracting Officer, the Contractor shall insert provisions similar to the provisions of this clause in all subcontracts under this contract.

§ 23-7.151 Government furnished property.

GOVERNMENT FURNISHED PROPERTY

(a) The Government reserves the right to furnish any property or facilities required for the performance of work under this contract. Except for books and publications, the Contractor shall not acquire any property whose cost of acquisition as a direct charge to the contract exceeds $150 per item for use hereunder without the advance authorization of the Contracting Officer. Title to all property furnished by the Government or acquired by the Contractor at the direction of the Government (hereinafter referred to as "Government furnished property") for use by the Contractor in the performance of the contract, shall remain in the Government. Unless otherwise agreed, title to all property acquired by the Contractor under authorization from the Government for use in the performance of this contract shall pass to the Government upon acceptance of delivery of the property by the Contractor. Title to Government furnished property shall not be affected by incorporation into or attachment to any property not owned by the Government, nor shall Government furnished property lose its identity as personalty by reason of its affixation to any realty.

(b) The delivery or performance dates for the supplies or services to be furnished to the Contractor under this contract are based upon the expectation that Government furnished property suitable for use (except for such property furnished "as is") will be delivered to the Contractor at the times stated in the contract or, if not so stated, in sufficient time to enable the Contractor to meet such delivery or performance dates. In the event that Government furnished property is not delivered to the Contractor by such time or times, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination of the delay, if any, occasioned the Contractor thereby, and shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by any such delay, in accordance with the procedures provided for in the clause of this contract entitled "Changes."

(c) Except for Government furnished property furnished "as is," in the event the Government furnished property is received by the Contractor in a condition not suitable for the intended use the Contractor shall, upon receipt thereof, notify the Contracting Officer of such fact and, as directed by the Contracting Officer, either (i) return such property at the Government's expense or otherwise dispose of the property, or (ii) effect repairs or modifications. Upon the completion of (i) or (ii) above, the Contracting Officer upon written request of the Contractor shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by the rejection or disposition, or the repair or modification, in accordance with the procedures provided for in the clause of this contract entitled "Changes." The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government furnished property or delivery of such property in a condition not suitable for its intended use.

(d) The Contractor shall maintain and administer in accordance with sound industrial practice, a program for the maintenance, repair, protection, and preservation of Government furnished property so as to assure its full availability and usefulness for the performance of this contract. The Contractor shall take all reasonable steps to comply with all appropriate directions or instructions which the Contracting Officer may prescribe as reasonably necessary for the protection of Government furnished property.

(1) The Contractor shall not be liable for any loss of or damage to the Government furnished property, or for expenses incidental to such loss or damage, except that the Contractor shall be responsible for any such loss or damage (including expenses incidental thereto) (i) which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of its managers,

superintendents, or other equivalent representatives, or (ii) which results from a failure on the part of the Contractor, due to the willful misconduct or lack of good faith on the part of any of its directors, officers, or other representatives mentioned in subparagraph (a) above, (A) to maintain and administer, in accordance with sound industrial practice, the program for maintenance, repair, protection, and preservation of Government furnished property as required by this clause, or (B) to take all reasonable steps to comply with any appropriate written directions of the Contracting Officer under this clause.

(2) Upon the happening of loss or destruction of or damage to the Government furnished property, the Contractor shall notify the Contracting Officer thereof, and shall take all reasonable steps to protect the Government furnished property from further damage. The Contractor shall make repairs and renovations of the damaged Government furnished property, or take such other action, as the Contracting Officer directs.

(e) The Government shall at all reasonable times have access to the premises where any of the Government furnished property is located.

(f) Nothing contained in this clause shall be deemed to alter or affect the provisions contained in the clause of this contract entitled "Security" or to derogate from the Contractor's responsibilities thereunder.

§ 23-7.152 Security.

SECURITY

(a) In the performance of the work under this contract, the Contractor shall be responsible for safeguarding classified information and protecting against sabotage, espionage, loss and theft, the classified documents, materials, equipment, processes, as well as such other material of high intrinsic or strategic value as may be in the Contractor's possession in connection with the performance of work under this contract.

(b) The Contractor agrees to conform to the security procedures which will be furnished by the Agency and which are predicated upon the Atomic Energy Commission's Security Regulations as may be modified by the Agency. The cost of physical changes to the Contractor's facilities required by such Contractor compliance beyond the normal practice of the Contractor under his contracts and not ordinarily charged as an indirect expense under his established accounting procedures will be the subject of separate negotiation, and a direct charge to this contract upon agreement. A change in security regulations and requirements made applicable to this contract subsequent to the effective date of the contract will be deemed a change in the amount or character of the work under the clause of this contract entitled "Changes."

(c) The Contractor shall not permit any individual to have access to classified information until notified by the Agency that the individual has been authorized access to classified information by the Agency as needed in the performance of duties under the contract.

(d) The disclosure by any officer, agent or employee of the Contractor or of any subcontractor to any unauthorized person, of classified information relating to this contract; or to performance hereunder, may result in criminal prosecution under the provisions of the Espionage Act, the Atomic Energy Act, or under other laws of the United States.

§ 23-7.153 Excusable delays.

(a) The following clause shall be used in fixed-price-type contracts, where appropriate.

EXCUSABLE DELAYS

Except with respect to defaults of subcontractors, the Contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by the Contractor to make progress in the prosecution of the work hereunder which endangers such performance) if such failure arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to: Acts of God or of the public enemy; acts of the Government in either its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes; freight embargoes; and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the failure of a subcontractor to perform or make progress, and if such failure arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be deemed to be in default, unless (i) the supplies or services to be furnished by the subcontractor were obtainable from other sources, (ii) the Contracting Officer shall have ordered the Contractor in writing to procure such supplies or services from such other sources, and (iii) the Contractor shall have failed to comply reasonably with such order. Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of such failure and, if he shall determine that any failure to perform was occasioned by any one or more of the said causes, shall make an equitable adjustment in the contract price or delivery sched-

ule (or both), in accordance with the procedures of the Changes clause of this contract, subject to the rights of the Government under the termination provisions of this contract.

§ 23-7.154 Publication and release of information.

PUBLICATION AND RELEASE OF INFORMATION

(a) It is agreed that the Contractor shall have the right to release and to publish unclassified information and subject data resulting from performance under this contract, subject to the limitations expressed below. It is further agreed that the Contractor may publish or release information and subject data only after he has requested in writing and obtained the written consent of the Contracting Officer to such publication or release of information and subject data. The Contracting Officer shall not refuse his consent to such publication or release unless the exceptions to the requirement for public disclosure in the Freedom of Information Act, 5 U.S.C. 552, would bar such publication or release by the Government.

(b) The Contractor also agrees that, for a period not to exceed 3 years following completion, expiration, or termination of this contract, the form of attribution by him of Agency support in any such publication or release shall be determined by the Contracting Officer prior to publication or release.

(c) The Contractor shall give prompt advance notice to the Contracting Officer of any plan for the publication, distribution or sale of any material or manuscript embodying subject data hereunder.

(d) The consent of the Contracting Officer shall not be required for publication or release of information of subject data or substantial portions thereof, delivered under this contract and made available by the Agency to the general public for inspection and copying under the Freedom of Information Act. The Contracting Officer shall notify the Contractor in writing of such availability as soon as practicable. The Contractor shall not thereafter be required to give notice of publication but he shall remain subject to the obligation of seeking consent to the form of any attribution for the agreed period. The consent of the Contracting Officer shall not be required for publication by the Contractor of his own proprietary data furnished to the Government under a confidential relationship.

§ 23-7.155 Order of precedence.

ORDER OF PRECEDENCE

In the event of an inconsistency in this contract, unless otherwise provided herein, the inconsistency shall be resolved by giving precedence in the following order: (a) Statement of Work (Article I); (b) general contract provisions; and (c) the other provisions of the contract whether incorporated by reference or otherwise.

Subpart 23-7.50—Clauses for Cost-Reimbursement-Type Contracts

§ 23-7.5000 Scope of subpart.

This subpart sets forth clauses to be used in cost-reimbursement-type contracts.

§ 23-7.5001 Applicability.

As used throughout this subpart, the term "cost-reimbursement-type contract" shall mean any contract which (a) is entered into on a cost, cost-sharing, cost-plus-a-fixed-fee, cost-plus-incentive-fee, or cost-plus-award-fee basis.

§ 23-7.5002 Clauses.

§ 23-7.5002-1 Definitions.

Insert the clause set forth at § 23-7.102-1. Additional definitions may be included in such clause: *Provided,* They are not inconsistent with such clause or the provisions of this subpart.

§ 23-7.5002-2 Changes.

(a) Clause:

CHANGES

The Contracting Officer may at any time issue written directions requiring additional work or omission of or variations in work covered by this contract, and within the general scope thereof. If any such direction results in a change in the amount or character of the work provided for herein, the parties shall agree upon appropriate adjustment in the delivery schedule or estimated time required for performance under this contract as well as in the estimated costs as provided in the clause of this contract entitled "Limitation of Cost" and in the fixed fee payable as provided in the clause of this contract entitled "Allowable Cost, Fixed Fee and Payment", and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within sixty (60) days from the date of receipt of the notification of change: *Provided, however,* That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any claim asserted at any time prior to final payment under this con-

tract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes". However, nothing in this clause shall excuse the Contractor from proceeding with the contract as modified.

(b)(1) The period of "sixty (60) days" within which any claim for adjustment must be asserted by the Contractor may be varied, but in no case may the period be for less than 30 days or for more than 120 days.

(2) The terms "fixed fee" in the foregoing clause may be omitted or varied to read "fee," "incentive fee," "award fee," or otherwise amended as may be appropriate.

(3) The title of the clause "Allowable Cost, Fixed Fee and Payment" may be amended to reflect the title of the clause actually included in the contract.

§ 23-7.5002-3 Limitation of cost.

(a) Clause:

LIMITATION OF COST

(a) It is estimated that the total costs of the Government, exclusive of any fixed fee, for the performance of this contract will not exceed ————. The Contractor agrees to use its best efforts to perform the work specified in the Statement of Work (Article I), and all obligations under this contract, within such estimated costs. If at any time, owing to the addition of new work hereunder or otherwise, the Contractor has reason to believe that the total costs to the Government, exclusive of any fixed fee, for the performance of this contract will be substantially greater or less than the estimated costs then in effect under this contract, the Contractor shall promptly notify the Contracting Officer in writing to that effect, giving the revised estimate of such total costs.

(b) The Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the estimated costs set forth above, and the Contractor shall not be obligated to continue performance under the contract or to incur costs in excess of the estimated costs set forth above, unless and until the Contracting Officer shall have notified the Contractor in writing that such estimated costs have been increased and shall have specified in such notice revised estimated costs which shall thereupon constitute the estimated costs of performance of this contract. When and to the extent that the estimated costs set forth above have been increased in the foregoing manner, costs incurred prior to such increase, though in excess of the previous estimated costs shall be allowable to the same extent as if such costs had been incurred after such increase.

(c) Written directions issued pursuant to the clause of this contract entitled "Changes" shall not be considered an authorization to the Contractor to exceed the estimated cost hereinabove set forth in paragraph (a) in the absence of a statement in any such written direction, or other contract amendment, increasing the estimated cost of this contract.

(d) It is understood and agreed that the Government reserves the right to furnish the Contractor with equipment and facilities necessary for the performance of the work.

(b) The clause set forth in paragraph (a) of this section shall be inserted in all cost-reimbursement-type contracts. The terms "fixed fee" in the clause may be omitted or varied to read "fee," "incentive fee," "award fee," or otherwise amended as may be appropriate.

§ 23-7.5002-4 Allowable cost, fee and payment.

(a) Clause:

ALLOWABLE COST, FIXED FEE, AND PAYMENT

(a) For the performance of this contract, the Government shall pay to the Contractor:

(1) The cost thereof (hereinafter referred to as "allowable costs") determined by the Agency to be allowable in accordance with—

(i) Subpart 1-15.2 of the Federal Procurement Regulations in effect on the date of this contract: *Provided, however,* That unallowable costs shall include but not be limited to the following items:

Overtime or shift premiums not reasonably or properly allocable to the contract work unless it will result in lower overall cost to the Government;

Equipment purchased as direct costs to the contract without prior approval of the Contracting Officer;

And provided further, That cost for air transportation will normally be allowed at less than first class rates only;

(ii) The terms of this contract; and

(2) A fixed fee in the aggregate amount of ———.

If additional tasks, calling for an increase in the total level of effort under this contract, should be issued and agreed to, the amount of the fee for each such additional project shall be the mutually agreed by the

parties and set forth in a written amendment to this contract.

(b) Once each month, the Contractor shall submit to the agency, in such form and reasonable detail as the Contracting Officer may require, an invoice or public voucher supported by a statement of costs incurred by the Contractor in the performance of this contract and claimed to constitute allowable costs. Each voucher shall show under each category of cost allocation both the amount currently billed and the cumulative costs for the category.

(c) Promptly after receipt of each invoice or voucher, the Agency shall review the document to the extent deemed necessary and appropriate, and authorize payment to be made of the approved amount. Payment of fee shall be made to the Contractor in monthly installments in the same proportion to the total fee as the associated month's costs bear to the total estimated costs: *Provided, however,* That after payment of eighty-five percent (85%) of the fee is made, further payment on account of such fee shall be withheld until final payment is made as provided in paragraph (e) of this clause.

(d) At any time or times prior to final payment under this contract the Contracting Officer may have invoices or vouchers and statements of costs audited by Government auditors. Each payment theretofore made shall be subject to reduction for amounts included in the related invoice or voucher which are found, on the basis of such audit, not to constitute allowable costs.

(e) On receipt and approval of the invoice or voucher designated by the Contractor as the "final invoice" or "final voucher", and upon compliance by the Contractor with all provisions of paragraphs (f) and (g) below, the Agency shall, after such audit as it considers necessary and appropriate, promptly pay to the Contractor any balance of allowable costs due and any part of the fixed-fee which has been withheld pursuant to paragraph (c) above or otherwise not paid to the Contractor. The final invoice or voucher shall be submitted by the Contractor promptly.

(f) The Contractor agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government to the extent that they are properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract. Reasonable expenses incurred by the Contractor for the purpose of securing such refunds, rebates, credits, or other amounts may be allowable costs hereunder when approved by the Contracting Officer. Prior to final payment under this contract, the Contractor and each assignee under this contract whose assignment is in effect at the time of final payment under this contract shall execute and deliver:

(i) An assignment to the Government, in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including any interest thereon) properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract; and

(ii) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions:

(A) Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor;

(B) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the Contractor to third parties arising out of the performance of this contract; *Provided,* That such claims are not known to the Contractor on the date of the execution of the release: *And provided further,* That the Contractor gives notice of such claims in writing to the Contracting Officer not more than six (6) years after the date of the release or the date of any notice to the Contractor that the Government is prepared to make final payment, whichever is earlier; and

(C) Claims, for reimbursement of costs (other than expenses of the Contractor by reason of his indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of this contract relating to patents.

(g) Notwithstanding the foregoing provisions of this clause, and pending the establishment of an actual overhead rate as agreed upon by the parties for the period covered by the performance of this contract, the Contractor shall be reimbursed for allowable indirect costs under this contract at billing rates acceptable to the Contracting Officer. At such time as the actual overhead rate has been established as provided above, an appropriate adjustment shall be made and the final payment made pursuant to paragraph (e) of this clause shall reflect such adjustment including, if appropriate, any repayment that may be due and owing from the Contractor to the Government. A failure by the parties to agree on any final rate or rates under this clause shall be considered a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(b) Except as provided in paragraph (c) of this section, the clause set forth above shall be inserted in all cost-reimbursement-type research and develop-

ment contracts. In the clause the term "fixed fee" may be omitted or varied to read "fee," "incentive fee," or "award fee," or otherwise modified as may be appropriate. The amount of agreed fixed fee is to be set forth in full. Paragraph (g) of the clause set forth in paragraph (a) of this section may be varied to take into account the contractor's established billing procedures.

(c) In the case of cost-sharing contracts or, where determined by the Contracting Officer to be appropriate, of cost-reimbursement-type contracts without fee—

(1) Insert the following paragraph in lieu of paragraph (c) of the clause set forth above in paragraph (a) of this section, except that if the contract does not provide for cost sharing, delete the parenthetical references to the Government's share—

(c) Promptly after receipt of each invoice or voucher, the Agency shall review the document to the extent deemed necessary and appropriate, and authorize payment to be made of the approved amount. After payment of an amount equal to eighty percent (80%) of (the Government's share of) the total estimated cost of performance of this contract set forth in the clause entitled "Limitation of Cost", further payment on account of allowable cost shall be withheld until a reserve of five (5%) percent of (the Government's share of) such total estimated cost shall have been set aside.

(2) Delete paragraph (a)(2) and the words "fixed fee" from paragraphs (a) or (e) of the clause set forth in paragraph (a) of this section. Amend paragraph (a)(1)(i) of the clause to reflect Subpart 1-15.3 when the contractor is an educational institution.

(3) In contracts which provide for cost sharing, change paragraph (a) of the clause set forth in paragraph (a) of this section as follows:

(a) For the performance of this contract, the Government shall pay to the Contractor:

(1) The cost thereof (hereinafter referred to as "allowable costs") determined by the Agency to be allowable in accordance with—

(i) Subpart 1-15.2 of the Federal Procurement Regulations in effect on the date of this contract; *Provided, however,* That unallowable costs shall include but not be limited to the following items:

Overtime or shift premiums not reasonably or properly allocable to the contract work unless it will result in lower overall cost to the Government;

Equipment purchased as direct costs to the contract without prior approval of the Contracting Officer;

And provided further, That cost for air transportation will normally be allowed at less than first-class rates only; and

(ii) the terms of this contract.

(d) In the clause paragraph (c) set forth in paragraph (c)(1), of this section, the percentage to be held in reserve may be varied as appropriate but in no case may it be less than five (5%) percent or more than ten (10%) percent.

(e)(1) The title of the clause set forth in paragraph (a) of this section shall be changed to "Allowable Cost and Payment," where appropriate.

(2) Other modifications to the clause set forth in paragraph (a) of this section may be made as appropriate to reflect the proper fee arrangement (such as incentive fee) concluded between the Government and the Contractor.

§ 23-7.5002-5 Subcontracts.

SUBCONTRACTS

(a) The Contractor shall not enter into any contractual undertaking with a third party, including individuals utilized by the Contractor as consultants (but excluding individuals serving or to serve as regular employees of the Contractor and agreements for the acquisition of office supplies that are expended in the performance of the contract) for the performance in whole or in part of any of the work under this contract without the prior consent of the Contracting Officer, which consent shall not be unreasonably withheld.

(b) The Contracting Officer may, in his discretion, ratify in writing any such subcontract; such action shall constitute the consent of the Contracting Officer required by this paragraph.

(c) The Contracting Officer may, in his discretion, specifically approve in writing any of the provisions of a subcontract. However, such approval or the consent of the Contracting Officer obtained as required by this clause shall not be construed to constitute a determination of the allowability of any cost under this contract, unless such approval specifically provides that it constitutes a determination of the allowability of such cost.

(d) Except as otherwise authorized in writing by the Contracting Officer, the Contractor shall insert provisions similar to

those contained in this clause in all subcontracts under this contract.

§ 23-7.5002-6 Litigation and claims.

(a) Clause:

LITIGATION AND CLAIMS

The Contractor shall give the Contracting Officer immediate notice in writing of any action filed against the Contractor arising out of the performance of this contract and of any claim (excluding billings by subcontractors or consultants for duly contracted services rendered in the performance of this contract) against the Contractor the cost and expense of which is allowable under the clause entitled "Allowable Cost, Fixed Fee and Payment". Except as otherwise directed by the Contracting Officer in writing, the Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor with respect to such action or claim. To the extent not in conflict with any applicable policy of insurance, the Contractor may, with the Contracting Officer's approval, settle any such action or claim, shall effect at the Contracting Officer's request an assignment and subrogation in favor of the Government of all the Contractor's right and claims (except those against the Government) arising out of any such action or claim against the Contractor, and, if required by the Contracting Officer, shall authorize representatives of the Government to settle or defend any such action or claim and to represent the Contractor in, or take charge of, any action. If the settlement or defense of an action or claim against the Contractor is undertaken by the Government, the Contractor shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action against the Contractor is not covered by a policy of insurance the Contractor shall, with the approval of the Contracting Officer, proceed with the defense of the action in good faith, and in such event the defense of the action shall be at the expense of the Government: *Provided, however,* That the Government shall not be liable for such expense to the extent that it would have been compensated for by insurance which was required by law or by the written direction of the Contracting Officer, but which the Contractor failed to secure through its own fault or negligence for reasons other than the refusal of an insurer to issue a policy which was required by Contracting Officer's direction.

(b) In the clause set forth in paragraph (a) of this section, the title of the clause "Allowable Cost, Fixed Fee and Payment" may be amended as appropriate.

§ 23-7.5002-7 Publication and release of information.

Insert the clause set forth in § 23-7.154 where the use of the clause is appropriate.

§ 23-7.5002-8 Materials.

Insert the clause set forth in § 23-7.150 where use of the clause is appropriate.

§ 23-7.5002-9 Government furnished property.

Insert the clause set forth in § 23-7.151 where use of the clause is appropriate, with such modification as may be necessary to reflect its inclusion in a cost-reimbursement-type contract.

§ 23-7.5002-10 Security.

Insert the clause set forth in § 23-7.152 where use of the clause is appropriate.

§ 23-7.5002-11 Order of precedence.

Insert the clause set forth in § 23-7.155 where use of the clause is appropriate.

PART 23-50—GRANTS

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23-50.501 Policy.
23-50.502 Copyrights and other rights in data.

AUTHORITY: Secs. 31, 32, 41, 75 Stat. 631, 22 U.S.C. 2571, 2572, 2581; sec. 601, 78 Stat. 252, 42 U.S.C. 2000d; secs. 1 and 2, 72 Stat. 1793, 42 U.S.C. 1891 and 1892; as amended.

SOURCE: 34 FR 7360, May 6, 1969, unless otherwise noted.

§ 23-50.000 Scope of part.

This part describes the method by which the U.S. Arms Control and Disarmament Agency makes grants, and the method by which U.S. public or private institutions or persons may apply for such grants.

§ 23-50.001 Definitions.

As used throughout this part, the following words have the meaning set forth below.

§ 23-50.001-1 ACDA or Agency.

ACDA or Agency means the U.S. Arms Control and Disarmament Agency.

§ 23-50.001-2 Act.

Act means the Arms Control and Disarmament Act, Pub. L. 87-297, 75 Stat. 631, compiled at 22 U.S.C. 2551 et seq., as amended from time to time.

§ 23-50.001-3 Director.

Director means the Director or Acting Director of the U.S. Arms Control and Disarmament Agency.

§ 23-50.001-4 Employee.

Employee includes anyone serving in the Agency as:

(a) A person appointed by the President and confirmed by the Senate to a position in the Agency.

(b) A person appointed by the Director or by his designee to a position in the Agency.

(c) A special Government employee.

§ 23-50.001-5 Granting Officer.

Granting Officer means the Agency official (other than the Director) empowered to make grants (see Part 23-51 of this title).

§ 23-50.001-6 Head of the Agency.

Head of the Agency means the Director of the U.S. Arms Control and Disarmament Agency.

§ 23-50.001-7 Special Government employee.

Special Government employee means a "special Government employee", as defined in section 202 of title 18 of the United States Code, who is employed by the agency.

Subpart 23-50.1—General

§ 23-50.101 Types of activities supported.

The Agency is authorized to make grants in support of or for the conduct of research, development and other studies in the field of arms control and disarmament.

§ 23-50.102 Extent of support.

The Agency may fund in whole or in part an activity it is authorized to support.

§ 23-50.103 Limitations.

(a) The authority of the Agency to make grants is limited to U.S. public or private institutions or persons. Accordingly, any application from an institution or person other than a U.S. public or private institution or person will not be considered. Private persons will not ordinarily be awarded grants except under the sponsorship of an educational institution of higher learning or of some other established nonprofit organization. Normally, organizations for profit will not be awarded grants. Exceptionally, grants may be made to such organizations if the results of its activities cannot otherwise be obtained and if one or more of the following criteria are met:

(1) The research, development, or study to be undertaken is of special concern or interest and shows promise of making an outstanding contribution to the acquisition of theoretical or

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practical knowledge in the field of arms control and disarmament;

(2) Unique resources are available for the work.

(b) The Act restricts the Agency's authority to make grants with respect to research, development and studies related to arms control and disarmament to the following:

(1) The detection, identification, inspection, monitoring, limitation, reduction, control, and elimination of armed forces and armaments, including thermonuclear, nuclear, missile, conventional, bacteriological, chemical, and radiological weapons;

(2) The techniques and systems of detecting, identifying, inspecting, and monitoring of tests of nuclear, thermonuclear, and other weapons;

(3) The analysis of national budgets, levels of industrial production, and economic indicators to determine the amounts spent by various countries for armaments;

(4) The control, reduction, and elimination of armed forces and armaments in space, in areas on and beneath the earth's surface, and in underwater regions;

(5) The structure and operation of international control and other organizations useful for arms control and disarmament;

(6) The training of scientists, technicians, and other personnel for manning the control systems which may be created by international arms control and disarmament agreements;

(7) The reduction and elimination of the danger of war resulting from accident, miscalculation, or possible surprise attack, including (but not limited to) improvements in the methods of communications between nations;

(8) The economic and political consequences of arms control and disarmament, including the problems of readjustment arising in industry and the reallocation of national resources;

(9) The arms control and disarmament implications of foreign and national security policies of the United States with a view to a better understanding of the significance of such policies for the achievement of arms control and disarmament;

(10) The national security and foreign policy implications of arms control and disarmament proposals with a view to a better understanding of the effect of such proposals upon national security and foreign policy;

(11) Methods for the maintenance of peace and security during different stages of arms control and disarmament;

(12) The scientific, economic, political, legal, social, psychological, military, and technological factors related to the prevention of war with a view to a better understanding of how the basic structure of a lasting peace may be established;

(13) Such related problems as the Director may determine to be in need of research, development, or study in order to carry out the provisions of the Act.

Subpart 23-50.2—Submission of Applications

§ 23-50.201 Who may apply for a grant.

Application for grants normally shall be submitted by a nonprofit organization, or by an educational institution. Such applications must be signed by an official duly authorized to execute such instruments.

§ 23-50.202 Where to submit applications.

Applications for grants shall be submitted to the Office of the Executive Director, U.S. Arms Control and Disarmament Agency, 320 21st Street NW., Washington, D.C. 20451.

§ 23-50.203 What to submit.

The Agency does not prescribe any particular format to govern the preparation of applications for grants. The Agency must be supplied, however, with essential information on which to base a determination to award a grant. The applications shall cover the points given below insofar as these may be applicable.

(a) *Name and address of institution.* The name, address, and telephone number of the prospective grantee shall be given. Where the official designation of the organization differs from the designation commonly used, the official designation shall be given, followed by the popular name enclosed in parentheses.

(b) *Title of proposed research.* The title of the proposed research should be brief but adequately descriptive.

(c) *Desired starting date of the research.* Proposed alternate starting dates may be specified, taking into account the time required by the Agency's personnel for review and evaluation.

(d) *Time period for which support is requested.* The length of time for which support is being requested, ordinarily up to a year, must be consistent with the nature and complexity of the proposed research. The Agency will consider and process each request for subsequent support as an application for a new research grant, except in those cases of pilot or feasibility studies which contemplate additional funding upon satisfactory conclusion of the preliminary study.

(e) *Description of proposed research.* Applications must include a brief abstract describing the proposed research. In addition, the applicant shall provide a more detailed description of the work to be undertaken, its objectives, and its relation to the present state of knowledge on the subject and to comparable work in progress elsewhere, together with pertinent bibliographic citations. The general plan of the work to be undertaken must be included. The Agency will be influenced by the adequacy of information in its appraisal of the merits of the proposed research.

(f) *Facilities and equipment.* (1) Prospective grantees should own or control the capital facilities and equipment necessary to the research. The application for grant must identify the facilities available, as well as those items of equipment specially adapted or suited to the proposed research. As a general policy, Agency grants do not provide for the acquisition, refurbishment, or renovation of facilities and equipment. Therefore, requests for such acquisition, refurbishment or renovation of equipment with grant funds for use in performance of the research requires prior Agency approval. Except as stated below, title to such equipment shall pass to the Government upon acquisition.

(2) Under the authority of 42 U.S.C. 1891 and 1892, grants may be made to nonprofit institutions of higher learning (or to nonprofit organizations whose primary purpose is the conduct of scientific research) for basic or applied scientific research. Such grants may permit title to specialized equipment for research purchased with grant funds to vest in such institutions or organizations without further obligation to the Government or on such other terms and conditions as the Agency deems appropriate.

(g) *Personnel.* (1) The principal investigator shall be responsible for direct supervision of the work and in most instances will participate in the conduct of the research regardless of whether or not he is to receive any compensation from the grant funds. The proposal shall list the names and titles of professional personnel to be associated directly with the research, including the level of effort each is expected to devote to the undertaking.

(2) A short biographical sketch of the principal investigator and a list of his principal publications must be included along with similar biological information on other senior professional personnel who will be directly associated with the project. If applicable, the number of student or other assistants, together with information as to their level of academic attainment, shall be listed. The names and tities of other scientific and technical personnel who are expected to be associated with the project in an advisory or consulting capacity must be shown.

(h) *Financial information.* Each applicant must submit an estimate of the total cost of the project, with a breakdown of estimated costs per year in the categories listed below. Parts 1-15.1 through 1-15.3 of this title set forth principles for determining what costs are reasonable and allowable. ACDA will use these principles in determining the extent to which it will support a research grant proposal. Applicants will list in similar categories, contributions that other sources will make to the research.

(1) *Salaries.* (i) List the names of personnel who will perform the work; the percentage of time each will devote to the research; and the present salary, rate of pay, or stipend of each individual who is to be compen-

sated under the grant; and, the total amount of salary per year that each will be paid from the grant.

(ii) Request funds to defray a portion, or all, of the salaries of personnel who will work on the research. Stipends or salaries charged against the grant must follow salary policies and be on a scale consistent with the regular practices of the grantee institution. The extent of compensation of individuals from grant funds will depend on the degree to which their services are necessary. For research to be conducted under a grant made to an educational institution, compensation shall be consistent with the institution's policies for work during the summer months.

(iii) Part or all of an individual's services may be charged against a grant: *Provided*, That he be relieved of a comparable portion of his teaching or other obligations and that his regular stipend or salary be reduced pro rata.

(2) *Equipment.* Itemize required equipment by description and estimated cost, and include a thorough justification for each (see paragraph (f) of this section).

(3) *Consumable property.* Indicate in general terms the types of required equipment and supplies that will be expended during performance under the grant.

(4) *Travel.* Indicate in as great detail as possible the type of anticipated travel, its frequency, and its applicability to the research. Grant funds may be used for travel only to the extent that expenditures are reasonable and bear a close relationship to the research work. No foreign travel shall be undertaken in fulfillment of the grant's objectives without specific written approval from the Granting Officer.

(5) *Publication costs.* Indicate all types of publication costs anticipated, including the purchase of reprints. (See Subpart 23-50.5 of this part.)

(6) *Other direct costs.* Itemize other anticipated direct costs not included above, such as computer charges and reference texts.

(7) *Indirect costs.* Institutions may claim indirect costs in accordance with cost principles set forth in Part 1-15 of this title.

(8) *Total.* Give total of all costs by years and a cumulative final total as well.

To the extent that the applicant considers such financial information privileged, he must identify the information to be protected and request expressly that it be held in confidence. (See paragraph (j) of this section.)

(i) *Other sponsors.* (1) State whether the proposal has been submitted to other possible sponsors (and if so, to whom), including other Federal agencies, and state proposed total cost to other sponsors. Indicate also any present sponsors of any portion of the program outlined in the proposal. The submission of the proposal to other organizations concurrently with its submission to ACDA will not prejudice its review by the Agency but notification of other sponsorship is required.

(2) In the event of ACDA partial sponsorship, if actual cost is less than anticipated, ACDA will expect a pro rata refund.

(j) *Privileged information.* When an application results in an Agency grant, the proposal itself becomes a part of the record of the transaction which may be made available to the public for inspection and copying upon specific request. If any information or material presented in an application for a grant is of a confidential character which meets the criteria of applicable law for protection against unauthorized disclosure, it will be withheld from disclosure to the general public under the authority of such applicable law, including the authority of the Freedom of Information Act (5 U.S.C. 552). The burden of asserting the privileged character of the information or material rests on the applicant. Such information shall be contained in an annex, conspicuously bearing an appropriately restrictive legend (see § 23-3.5002 of this title), six copies of which must accompany the application.

Subpart 23-50.3—Financial Support

§ 23-50.301 Educational institutions and other organizational grantees.

Funds provided under Agency grants may be expended by organizations or by educational institutions for those direct and indirect expenditures recognized under applicable cost principles set forth in Subparts 1-15.1, 1-15.2, or 1-15.3 of this part, and those specific items of allowable costs set forth in the grant instrument.

§ 23-50.302 Individual grantees.

Financial support provided directly by the Agency to individual grantees, or indirectly to such grantees through some nonprofit academic organization or educational institution of higher learning may or may not cover the entire expenses borne by the individual. Such support may take the form of stipends, subsistence, travel, or book allowances. In appropriate circumstances and as a condition precedent to making the grant, the Agency may require an individual grantee to certify that he will diligently pursue the research to substantial completion. Where such a condition has been required, the grant will contain a provision to the effect that the grantee will repay on demand by the Agency all monies advanced to him in the event of his failure to pursue the research to substantial completion.

Subpart 23-50.4—Administration of Grants

§ 23-50.401 Terms and conditions of grants.

(a) The provisions set forth in the instrument of grant (or incorporated by reference) shall be binding upon the grantee. During the period of the grant, modifications of the original provisions, which may be agreed from time to time, shall be reduced to writing and form part of the instrument of grant as a binding amendment thereto.

(b) An original of the instrument of grant shall be delivered to the grantee. In the case of grants made to organizations, copies of the instrument shall be sent to the principal investigator and to the administrative officer (if any).

(c) In appropriate circumstances, a grant instrument may contain a provision stating that the Agency shall not be liable (1) for injuries sustained by the grantee, his officers, agents, employees or members of his family or (2) for property damage sustained by any such person during performance under the grant. The instrument shall also contain a provision that the grantee and not the Agency shall be responsible for liabilities to third persons for either property damage or personal injuries and that by his acceptance of the grant the grantee agrees not to assert a claim against the Government for reimbursement of expenses and costs resulting from such liabilities.

(d) In the case of all grants, unless otherwise specified in the grant letter, the grantee will be required to:

(1) Furnish a draft of the final report for Agency comments thirty (30) days prior to the due date of the final report;

(2) Furnish to the Agency, in the case of grants for which the grant period is in excess of six (6) months, not more than ten (10) copies of a brief interim status report at three (3) month intervals; and

(3) Furnish a reproducible master of a comprehensive final report, prepared in accordance with Agency specifications, to the Agency on or before the expiration date of the grant; the final report shall include a summary of its contents.

§ 23-50.402 Fiscal administration.

(a) In the absence of specific written authorization contained in the instrument of grant, expenditures incurred by the grantee prior to the date of the grant and otherwise reasonable and allocable to the grant shall not be charged thereto directly or indirectly.

(b) Funds not expended or committed under a binding legal obligation prior to termination of the grant or the expiration of the grant period, shall be remitted promptly by check in a sum increased by the amount of any earned or accrued interest. The check shall be made payable to the U.S.

Arms Control and Disarmament Agency and identified by the Agency's grant designation.

(c) Generally, the Agency will provide grant funds quarterly and in advance.

(d) Each application for a research project shall be accompanied by an itemized budget which shall be approved by ACDA in the grant instrument. Within the limits of the total budget, deviations from the itemized budget estimates submitted with the proposal are permissible. However, the grantee or principal investigator shall inform ACDA promptly of any contemplated major deviations, shall state the reasons therefor, and shall not initiate such deviations without prior written approval from the Agency.

(e) Projects supported by Agency grant must be performed within the stated limit of funds.

(f) Grant funds received from the Agency will be deposited in separate checking (or other type of accounts) established and maintained by the grantee. In no event shall such funds (1) be commingled with the personal funds of the grantee or of any officer or agent of the grantee organization; or (2) be deposited in personal bank accounts for disbursement by personal check.

(g) The grantee shall maintain separate records for each grant in accordance with generally accepted accounting principles. Such records shall provide the basis for any fiscal reports that may be required. All accounting records relating to expenditures under each grant shall be subject to examination and audit by authorized representatives of ACDA at all reasonable times during the period of the grant and for 3 years after termination. In addition, the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after termination of the grant, have access to and the right to examine any directly pertinent books, documents, and records of the grantee involving transactions relating to the grant.

(h) A final fiscal report containing an itemized statement of the disposition of all grant funds shall be submitted within ninety (90) days after the completion of work under the grant. An interim fiscal report containing an itemized statement of expenditures and commitments made and of any interest earned on grant funds, shall be submitted at 3-month intervals.

(i) Agency grants may not be transferred from one grantee to another without the execution of a novation or other appropriate agreement executed by the existing and prospective grantees as well as by the Agency. A request for such a transfer shall be administratively processed as an application for a new grant.

§ 23-50.403 Patents.

(a) Section 32 of the Act states that all research within the United States sponsored, cosponsored, or authorized under the Act, shall be provided for in such manner that all information as to uses, products, processes, patents and other developments resulting from such research developed by government expenditure will (with such exceptions and limitations, if any, as the Director may find to be necessary in the public interest) be available to the general public. Section 32 shall not be so construed as to deprive the owner of any background patent relating thereto of such rights as he may have thereunder.

(b) The instrument of grant will contain a provision to the effect that the grantee or principal investigator shall promptly disclose to ACDA all discoveries and inventions conceived or first actually reduced to practice in the performance of work aided or supported under the grant. The grantee will, upon request, assign, and transfer to the United States, as represented for this purpose by ACDA, full and entire, right, title, and interest in and to such discoveries or inventions; *Provided, however,* That in the absence of any request by the Agency for such an assignment or transfer, the grantee agrees in any event that it will grant an irrevocable, nonexclusive, nontransferable, royalty-free license for the practice throughout the world, by or on behalf of the United States or by any foreign government or international organization pursuant to any treaty or other agreement with the

Government of the United States, of each such discovery or invention. The grantee will warrant that he has or shall obtain full authority to make such assignments and transfers by obtaining from all persons who will be participating in the research project agreements to assign to the grantee all discoveries and inventions conceived or first actually reduced to practice during the grant period with the aid or support of grant funds.

(c) If to the best of the grantee's knowledge and belief no inventions have been conceived or first actually reduced to practice during the grant period with the aid or support of grant funds, the grantee shall so certify to ACDA at the termination of the grant period. Nothing contained herein shall be deemed to require the grant of any rights to the United States under any invention other than an invention conceived or first actually reduced to practice during the grant period and as a result of performance of work aided or supported under the grant.

§ 23-50.404 Security.

(a) To the maximum extent practicable, projects sponsored or assisted by Agency grant shall be unclassified and free of any information, which under paragraph (b) of this section, is likely to serve as a bar to publication.

(b) Special provisions, pertaining to security or to administrative controls necessary to avoid unauthorized disclosure, shall be incorporated in the grant instrument, in appropriate circumstances. These include circumstances where the performance of work under the grant requires or involves access to Restricted Data or other classified information, or to information the public disclosure of which would, in the opinion of the Agency, violate a confidential relationship or other obligation established or recognized by law requiring the Agency to withhold publication.

§ 23-50.405 Equal opportunity.

Each grant shall contain a provision to the effect that no person in the United States shall (a) be excluded from participation in performance under this grant, (b) be denied the benefits of the grant, or (c) be subjected to any discrimination under the grant, on the grounds of race, color, or national origin. The grant shall also require compliance on the part of the grantee with such Agency regulations as may be promulgated from time to time to effectuate the objectives of such equal opportunity.

Subpart 23-50.5—Publication

§ 23-50.501 Policy.

The Agency is concerned that research, development, or study projects sponsored or assisted by its grants take proper account of the public interest and the interests of scholars as well as of potential users of the resulting information. Scholars or other investigators engaged in such projects shall be free to exercise their best professional judgments as to the content of the project report, whose ultimate acceptance will depend on its intrinsic merit.

§ 23-50.502 Copyrights and other rights in data.

(a) Agency support of such projects entitles the Agency to monitor closely the publication and distribution of the project report to ensure that publication and distribution reflect adequately the public interest. Various procedures are available to effectuate the Agency's policy. One procedure would permit the publication and dissemination under copyright held by the grantee with grant of an irrevocable, nonexclusive, transferable, royalty-free license to the Government. Another would permit publication and dissemination by the Government without statutory copyright protection. The instrument of grant shall contain appropriate provisions to such effect.

(b) With respect to any release of unclassified information (including, without limitation, any news release, article, brochure, speech, manuscript, or other material) which discloses either the existence of the study supported by the grant or the work product of the grant (including, without limitation, factual findings, hypotheses, conclusions, opinions, or recommendations), the grantee shall: (1)

Provide the Agency with a copy of the proposed release at least thirty (30) days prior to the release date; and (2) unless otherwise directed in writing by the Granting Officer, make an appropriate acknowledgment of support by the U.S. Arms Control and Disarmament Agency and if the work product of the grant is disclosed, include in the release the following disclaimer:

> The ideas and conclusions presented herein are solely those of the author(s). They do not necessarily correspond to those of the U.S. Arms Control and Disarmament Agency or of any other agency or department of the U.S. Government.

PART 23-51—DELEGATIONS OF PROCUREMENT AUTHORITY

Sec.

23-51.000 Scope of part.

Subpart 23-51.1—General

23-51.101 Delegation.

Subpart 23-51.2—Delegations

23-51.201 The Executive Director.
23-51.202 Chief of the Contracts Branch.
23-51.203 Contract Specialist.
23-51.204 Library.
23-51.205 General Services.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); sec. 302, 63 Stat. 393, 41 U.S.C. 252; sec. 304, 63 Stat. 395, 41 U.S.C. 254; sec. 307, 63 Stat. 396, 41 U.S.C. 257; and sec. 41, 75 Stat. 631, 22 U.S.C. 2581.

SOURCE: 33 FR 19234, Dec. 24, 1968, unless otherwise noted.

§ 23-51.000 Scope of part.

This part sets forth the delegations of authority to make findings and determinations, to negotiate, execute, award, and administer contracts, interagency agreements, purchase orders, other contractual arrangements and grants, hereinafter referred to as "contracts," unless otherwise stated.

Subpart 23-51.1—General

§ 23-51.101 Delegation.

(a) Except as otherwise provided by law, regulation, or specific memoranda of delegation, the authority of the Director of the U.S. Arms Control and Disarmament Agency to make findings and determinations, to negotiate, execute, award, and administer contracts for the acquisition of personal property and services (including construction) and the acquisition of real property by lease, is hereby delegated to those officials designated in Subpart 23-51.2 of this part, and (unless otherwise stated) to any official designated to act for one of those enumerated during the absence or incapacity of the latter, subject to the specific limitations stated in this Part 23-51.

(b) Unless otherwise limited in this Part 23-51, the contracting officers named in Subpart 23-51.2 of this part may designate one or more qualified Government officials to act as their authorized representatives, and authority is hereby delegated to such officials to administer the performance of work required by the contracts. Designations will be in writing and will specifically state the scope and limitations of the designee's contractual authority which must be within the scope of authority possessed by the designating Contracting Officer. The signed original or duplicate original of such delegations of authority shall be retained in the files for examination and a copy given to the contractor.

(c) When exercising the authority contained in this Part 23-51, the designated procurement official is identified as the Contracting Officer and will function within the limits prescribed by law, Federal Procurement Regulations, Procurement Regulations of the U.S. Arms Control and Disarmament Agency and all applicable provisions of Executive orders, regulations, and directives which are now in effect or which may be issued hereafter by competent authority.

(d) The Executive Director is designated as the chief officer responsible for procurement. In collaboration with the General Counsel or his designee, he shall formulate procurement policy for the Director's approval and within the policy approved by the Director shall prescribe standards and procedures for the negotiation, award and administration of contracts.

Subpart 23-51.2—Delegations

§ 23-51.201 The Executive Director.

(a) To the Executive Director is delegated the following authority:

(1) Subject to availability of funds, to enter into contracts or contract modifications which will not require the expenditure of more than $1 million for the acquisition of property or services following formal advertising.

(2) To make findings and determinations required for the negotiation of individual contracts under the following paragraphs of 41 U.S.C. 252(c):

(i) Paragraphs (2) through (10), inclusively;

(ii) Paragraph (14).

(3) To make class findings and determinations required for the negotiation of contracts under 41 U.S.C. 252(c)(10).

(4) Subject to availability of funds, to enter into negotiated contracts for the acquisition of property or services, and modifications of any kind to such contracts, which will not require the expenditure of more than $1 million either for an individual contract or for a contract modification.

(5) To appoint ordering officers under any contract who shall be empowered to place orders, request special responses or issue technical directions, within the agreed scope of any such contract.

(6) To make final decisions under the Disputes clause contained in any contract, and to terminate the contract, without regard to the total amount of funds in dispute.

(7) To make determinations required by 41 U.S.C. 254(b), as to the estimated cost of, and fees to be paid under, cost-plus-a-fixed-fee contracts.

(8) To make determinations required by 41 U.S.C. 254(b), that the use of a cost or a cost-plus-a-fixed-fee contract or an incentive-type-contract is likely to be less costly than other methods or that it is impracticable to secure property or services of the kind and quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract.

(9) To make the determination under 41 U.S.C. 253(b), that it is in the public interest to reject all bids.

(10) The determination required by 41 U.S.C. 255(c) that the making of advance payments would be in the public interest.

(11) The determination required by § 1-3.807-3(b) of Chapter 1 of this title with respect to waiving a requirement for the submission of cost or pricing data and the certification thereof.

(12) To make interagency agreements, which will not require the expenditure of more than $1 million, under the provisions of section 601 of the Economy Act of 1932, 31 U.S.C. 686, or any other enabling legislation, for the acquisition of property or services.

(13) To determine, as required by § 23-52.104-1(b), that a contractor may be permitted to obtain title to a subject discovery or invention under the Patent clause set forth in § 23-52.104-2.

(b) The Executive Director is hereby delegated the authority to make grants (without limitation as to type and including grants in aid) under 22 U.S.C. 2571 or, where appropriate, under 42 U.S.C. 1891, which will not require the expenditure of more than $1 million.

(c) Pursuant to the provisions of § 1-12.805 of Chapter 1 of this title, the Executive Director is hereby appointed Deputy Contract Compliance Officer for purposes of Equal Opportunity in Employment.

§ 23-51.202 Chief of the Contracts Branch.

(a) To the Chief of the Contracts Branch is delegated the following authority:

(1) Subject to availability of funds, to enter into contracts or contract modifications which will not require the expenditure of more than $500,000 for the acquisition of property or services following formal advertising.

(2) To make findings and determinations required for the negotiation of individual contracts under the following paragraphs of 41 U.S.C. 252(c):

(i) Paragraphs (2) through (10), inclusively;

(ii) Paragraph (11), provided that the contract will not require the expenditure of more than $25,000;

(iii) Paragraph (14).

(3) To make class findings and determinations required for the negotiation of contracts under 41 U.S.C. 252(c)(10).

(4) Subject to availability of funds, to enter into negotiated contracts for the acquisition of property or services, and modifications of any kind to such contracts, which will not require the expenditure of more than $500,000 either for an individual contract or for a contract modification.

(5) To appoint ordering officers under any contract who shall be empowered to place orders, request special responses, or issue technical directions, within the agreed scope of any such contract.

(6) To make final decisions under the Disputes clause contained in any contract, and to terminate the contract, without regard to the total amount of funds in dispute.

(7) To make determinations required by 41 U.S.C. 254(b) as to the estimated cost of, and fees to be paid under, cost-plus-a-fixed-fee contracts.

(8) To make determinations required by 41 U.S.C. 254(b) that the use of a cost or a cost-plus-a-fixed-fee contract or an incentive-type contract is likely to be less costly than other methods or that it is impracticable to secure property or services of the kind and quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract.

(9) To make the determination under 41 U.S.C. 253(b) that it is in the public interest to reject all bids.

(10) The determination required by 41 U.S.C. 255(c) that the making of advance payments would be in the public interest.

(11) The determination required by § 1-3.807-3(b) of Chapter 1 of this title with respect to waiving a requirement for the submission of cost or pricing data and the certification thereof.

(12) To make interagency agreements, which will not require the expenditure of more than $500,000, under the provisions of section 601 of the Economy Act of 1932, 31 U.S.C. 686, or under any other enabling legislation, for the acquisition of property or services.

(b) The Chief of the Contracts Branch is hereby delegated the authority to make grants (without limitation as to type including grants in aid) under 22 U.S.C. 2571 or, where appropriate, under 41 U.S.C. 1891, which will not require the expenditure of more than $500,000.

(c) Pursuant to the provisions of § 1-12.805 of Chapter 1 of this title, the Chief of the Contracts Branch is hereby appointed Assistant Contract Compliance Officer for purposes of Equal Opportunity in Employment.

§ 23-51.203 Contract Specialist.

(a) To the Contract Specialist is delegated the following authority:

(1) Subject to availability of funds, to enter into contracts or contract modifications which will not require the expenditure of more than $100,000 for the acquisition of property or services following formal advertising.

(2) To make findings and determinations required for the negotiation of individual contracts under the following paragraphs of 41 U.S.C. 252(c):

(i) Paragraphs (2) through (10), inclusively;

(ii) Paragraph (14).

(3) To make class findings and determinations required for the negotiation of contracts under 41 U.S.C. 252(c)(10).

(4) Subject to availability of funds, to enter into negotiated contracts for the acquisition of property or services, and modifications of any kind to such contracts, which will not require the expenditure of more than $100,000 either for an individual contract or for a contract modification.

(5) To appoint ordering officers under any contract who shall be empowered to place orders, request special responses, or issue technical directions, within the agreed scope of any such contract.

(6) To make final decisions under the Disputes clause contained in any contract, and to terminate the contract, without regard to the total amount of funds in dispute.

(7) To make determinations required by 41 U.S.C. 254(b) as to the estimated cost of, and fees to be paid under, cost-plus-a-fixed-fee contracts.

(8) To make determinations required by 41 U.S.C. 254(b) that the use of a

cost or a cost-plus-a-fixed-fee contract or an incentive-type contract is likely to be less costly than other methods or that it is impracticable to secure property or services of the kind and quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract.

(9) To make the determination under 41 U.S.C. 253(b) that it is in the public interest to reject all bids.

(10) The determination required by 41 U.S.C. 255(c) that the making of advance payments would be in the public interest.

(11) The determination required by § 1-3.807-3(b) of Chapter 1 of this title with respect to waiving a requirement for the submission of cost or pricing data and the certification thereof.

(12) To make interagency agreements, which will not require the expenditure of more than $100,000, under the provisions of section 601 of the Economy Act of 1932, 31 U.S.C. 686, or under any other enabling legislation, for the acquisition of property or services.

(b) (1) The Contract Specialist is hereby delegated the authority to make grants (without limitation as to type including grants in aid) under 22 U.S.C. 2571 or, where appropriate, under 42 U.S.C. 1891, which will not require the expenditure of more than $100,000.

(2) The foregoing authority may be exercised only by the incumbent of the position.

§ 23-51.204 Library.

The authority to make minor purchases under 41 U.S.C. 52(c)(3), and to place orders under interagency agreements, for the acquisition of newspapers, books, periodicals, maps, library supplies, and for the acquisition of publication, binding and repair services is hereby delegated to the Chief, Reference Information Center, and to the Librarian. This authority may be exercised only by the incumbents of the positions.

§ 23-51.205 General services.

The authority to make minor purchases under 41 U.S.C. 252(c)(3), and to place orders under interagency agreements for the acquisition of office furniture, equipment, and supplies; telephone equipment and services; maintenance, repair, and janitorial services is hereby delegated to the General Services Assistant. This authority may be exercised only by the incumbent of the position.

PART 23-52—PATENTS, DATA AND COPYRIGHTS

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23-52.102-1 Authorization and consent in contracts for research or development.
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23-52.103 Notice and assistance regarding patent and copyright infringement.
23-52.104 Patent rights.
23-52.104-1 Policy.
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23-52.105 Royalties.

Subpart 23-52.2—Data and Copyrights

23-52.200 Scope of subpart.
23-52.201 Definitions.
23-52.202 Acquisition of rights in subject data.
23-52.202-1 Background.
23-52.202-2 Policy.
23-52.203 Contract clauses.

AUTHORITY: Secs. 31, 32, and 41, 75 Stat. 631, 22 U.S.C. 2571, 2572, 2581; sec. 646, 62 Stat. 942, 28 U.S.C. 1498; and sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); as amended.

SOURCE: 33 FR 19236, Dec. 24, 1968, unless otherwise noted.

§ 23-52.000 Scope of part.

This part sets forth policies, instructions, and contract clauses pertaining to patents, data, and copyrights in connection with the procurement of supplies and services.

Subpart 23-52.1—Patents

§ 23-52.100 Scope of subpart.

This subpart prescribes contract clauses and instructions which define and implement the policy of the U.S.

Arms Control and Disarmament Agency with respect to—

(a) Inventions made in the course of experimental, developmental, or research work performed under Government contracts;

(b) Patent infringement liability resulting from work performed by or for the Government;

(c) Royalties payable in connection with the performance of Government contracts;

(d) Security requirements covering patent applications containing classified subject matter filed by the contractors.

§ 23-52.101 Authorization and consent.

(a) Under 28 U.S.C. 1498, any suit for infringement of a U.S. patent based on the manufacture or use by or for the United States of an invention described in and covered by a patent of the United States by a contractor or by a subcontractor (including lower-tier subcontractors) can be maintained only against the Government in the Court of Claims, and not against the contractor or subcontractor, in those cases where the Government has authorized or consented to the manufacture or use of the patented invention. Accordingly, to insure that work by a contractor or subcontractor under a Government contract may not be enjoined by reason of patent infringement, authorization and consent shall be given as herein provided. The liability of the Government for damages in any such suit against it may, however, ultimately be borne by the contractor or subcontractor in accordance with the terms of any patent indemnity clause also included in the contract, and an authorization and consent clause does not detract from any patent indemnification commitment by the contractor or subcontractor. Therefore, both a patent indemnity clause and an authorization and consent clause may be included in the same contract.

(b) Any provision whereby the Government expressly agrees to indemnify the contractor against liability for patent infringement shall not be included in a contract.

§ 23-52.102 Contract clauses.

§ 23-52.102-1 Authorization and consent in contracts for research or development.

(a) The clause set forth below shall be used in contracts calling for experimental, developmental, or research work or in contracts for both supplies and experimental, developmental, and research work where the latter work is a primary purpose of the contract.

(b) Clause:

AUTHORIZATION AND CONSENT

The Government hereby gives its authorization and consent for all use and manufacture of any invention described in and covered by a patent of the United States in the performance of this contract or any part hereof or any amendment hereto or any subcontract hereunder (including any lower-tier subcontract).

§ 23-52.102-2 Authorization and consent in contracts for supplies or services.

(a) The contract clause set forth below shall be used in contracts for supplies or services, or both, which do not include experimental, developmental, or research work as a primary purpose of the contract.

(b) Clause:

AUTHORIZATION AND CONSENT

The Government hereby gives its authorization and consent (without prejudice to any rights of indemnification) for all use and manufacture, in the performance of this contract or any part hereof or any amendment hereto or any subcontract hereunder (including any lower-tier subcontract), of any invention described in and covered by a patent of the United States (i) embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract, or (ii) utilized in the machinery, tools, or methods the use of which necessarily results from compliance by the Contractor or the using subcontractor with (a) specifications or written provisions now or hereafter forming a part of this contract, or (b) specific written instructions given by the Contracting Officer directing the manner of performance. The entire liability to the Government for infringement of a patent of the United States shall be determined solely by the provisions of the indemnity clauses, if any, included in this contract or any subcontract hereunder (including any lower-tier subcontract), and the Government as-

sumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

§ 23-52.102-3 Patent indemnification.

In appropriate cases a patent indemnity clause for the benefit of the Government shall be included in the contract.

§ 23-52.103 Notice and assistance regarding patent and copyright infringement.

(a) Clause:

NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT

(a) The Contractor shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this contract of which the Contractor has knowledge.

(b) In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed hereunder, the Contractor shall furnish to the Government, when requested by the Contracting Officer, all evidence and information in possession of the Contractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except where the Contractor has agreed to indemnify the Government.

(c) This clause shall be included in all subcontracts.

§ 23-52.104 Patent rights.

§ 23-52.104-1 Policy.

(a) Section 32 of the Arms Control and Disarmament Act (22 U.S.C. 2572) requires that all research within the United States contracted for, sponsored, cosponsored, or authorized under authority of the Act shall be provided for in such manner that all information as to uses, products, processes, patents and other developments resulting from such research developed by Government expenditure will (with such exceptions and limitations, if any, as the Director of the Agency may find necessary in the public interest) be available to the general public. The owners of any background patent relating thereto shall not be deprived, under the authority of the Act, of such rights as they may have.

(b) In appropriate cases, the Director may determine to permit the Contractor to obtain title subject to the granting of an irrevocable, royalty-free, nonexclusive, nontransferable license for the practice of a patented discovery or invention by or on behalf of the United States, or by or on behalf of any foreign government or international organization pursuant to any treaty or other agreement with the Government of the United States.

(c) In those cases where the discovery or subject invention relates to atomic energy, the Agency after consulting with representatives of the Atomic Energy Commission will inform the contractor of what rights, if any, he may have under any patent application or patent that may be used thereon.

§ 23-52.104-2 Patent rights clause.

(a) The following clause shall be inserted in all contracts, save in those cases where the Director has made exceptions or has provided for limitations, or which are otherwise exempt under applicable law.

PATENTS

(a) The Contractor agrees that it will promptly disclose to the Government all discoveries and inventions conceived or first actually reduced to practice in the performance of the work called for or required under this contract, and that it will, upon request, assign and transfer to the United States, as represented for this purpose by the Agency, full and entire right, title, and interest in and to such discoveries or inventions, subject to the reservation of a nonexclusive and royalty-free license to the Contractor: *Provided, however,* That the Contractor shall not make nor be entitled to (except as the Government in its sole discretion may grant any rights) such reservation as to any discovery or invention involving production or utilization of special nuclear material or atomic energy within the purview of the Atomic Energy Acts of 1946 and of 1954 (as amended): *And, provided further,* That in the absence of any request by the Agency for such an assignment and transfer of entire right, title, and interest, the Contractor agrees in any event that it will grant an irrevocable, nonexclusive, nontransferable, royalty-free license for the practice throughout the world, by or on behalf of the United States or by or on behalf of any foreign government or international organization pursuant to any treaty or other

agreement with the Government of the United States, of each such discovery or invention.

(b) The Contractor warrants that it has or will obtain full authority to effectuate the purposes of paragraph (a) of this clause from all persons who perform any part of the work under this contract, except such clerical and manual labor personnel as will not have access to technical data.

(c) If to the best of the Contractor's knowledge and belief no inventions have been conceived or first actually reduced to practice during and as a result of the performance of the work under this contract, the Contractor shall so certify to the Contracting Officer upon conclusion of the work. Nothing contained in this or any other clause hereof shall be deemed to grant any rights to the Government under any invention other than an invention conceived or first actually reduced to practice during and as a result of the performance of the work under this contract.

(d) Except as otherwise authorized in writing by the Contracting Officer, the Contractor shall insert provisions similar to those contained in this clause in all subcontracts under this contract.

(e) No claim for pecuniary award or compensation under the provisions of the Atomic Energy Acts of 1946 and of 1954 (as amended) shall be asserted by the Contractor or his employees with respect to any discovery or invention covered by this clause.

(b) In appropriate cases, such as where an industry-wide cross-license is made as a common practice, the clause set forth in paragraph (a) of this section may be amended as a result of the contract negotiations to permit the contractor to reserve to himself a license broad enough to include such cross-licensing.

§ 23-52.105 Royalties.

(a) The term "royalties" refers to any costs or charges in the nature of royalties, license fees, patent or license authorization costs, or the like, for the use of or for rights in patents or patent applications.

(b) Cost-type contracts shall include the clause set forth below, unless it has been determined that no royalties are likely to be paid by the contractor.

ROYALTIES

Payment by the Contractor of any sum for royalties or for patent rights not included in the ordinary purchase price of standard commercial supplies shall not constitute items of allowable cost hereunder, unless and until approved by the Contracting Officer. Reimbursement to the Contractor on account of any such payments shall not be construed as an admission by the Government of the enforceability, validity or scope of, or title to any of the patents involved, nor shall any such reimbursement constitute a waiver of any rights or defenses respecting such patents.

Subpart 23-52.2—Data and Copyrights

§ 23-52.200 Scope of subpart.

This subpart sets forth policies, instructions, and contract clauses with respect to acquisition of rights in data and copyrights. It relates only to the acquisition of rights in data and does not establish requirements for data.

§ 23-52.201 Definitions.

For the purposes of this subpart the following terms have the meanings set forth below:

(a) "Data" means writings, sound recordings, pictorial reproductions, drawings, or other graphic representations and works of similar nature, whether or not copyrighted. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) "Limited rights" means right to use, duplicate, or disclose subject or other specified data in whole or in part by or for the Government, with the express limitation that such data may not be released outside the Government except as may be specifically authorized in the contract or in another writing by the contractor.

(c) "Subject Data" means all writings, technical information, graphic or recorded material; and all information as to uses, products, processes, patents, inventions, and other materials developed under the contract; specified to be delivered under the contract, whether or not copyrighted. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(d) "Unlimited rights" means rights to use, duplicate, or disclose subject or other specified data in whole or in part, in any manner and for any pur-

pose whatsoever, and to have or permit others to do so.

§ 23-52.202 Acquisition of rights in subject data.

§ 23-52.202-1 Background.

The Agency has a statutory obligation to insure the acquisition of a fund of theoretical and practical knowledge regarding arms control and disarmament particularly by means of research, development, and other studies. The acquisition of such a fund of knowledge is accomplished in part by contracting for research in a particular field of arms control or of disarmament which results in a final report. These reports, if unclassified or free of information authorized by law to be withheld from the general public, can be made available to the general public either by duplication or publication. Publications can be accomplished by the Government itself, or by Government consent to publication by the contractor. In the light of the foregoing, the need for acquisition of rights in data is clear.

§ 23-52.202-2 Policy.

(a) It is the policy of the United States Arms Control and Disarmament Agency to acquire such data and rights in data as will permit the Agency to fulfill its statutory obligations. Ordinarily these obligations will be satisfied by the acquisition of unlimited rights. However such unlimited rights are not normally incompatible with retention by the contractor of entitlement to any copyright that he may wish to seek.

(b) Commercial organizations may have a valid economic interest in data they have developed at their own expense for competitive purposes. Such data, particularly data which discloses details of design or manufacture is often closely held because its disclosure to competitiors could jeopardize the competitive advantage it was developed to provide. Public disclosure of such data can cause economic hardship to the originating organization.

(c) The Government must not be barred from acquiring such data and such rights therein, limited or unlimited, as it needs even though that data may normally not be disclosed in commercial practice. Moreover, when the Government pays for research and development which produces new knowledge, products or processes, it has an obligation to foster technological progress through wide dissemination of the new and useful information derived from such work and, where practicable, provide competitive opportunities for supplying the new products and utilizing the new processes.

(d) The Government and the contractor may enter into an agreement to be incorporated in the contract which shall list or describe that data which is proprietary and the specific rights therein being acquired by the Government.

§ 23-52.203 Contract clauses.

(a) The clause set forth in paragraph (b) shall be inserted in all contracts requiring the delivery of Subject Data. The clause is not applicable to the acquisition of rights in such special works as movies or video tape for television. Normally the Government will acquire all rights and title to such special works and be the sole proprietor.

(b) Basic subject data clause.

DATA

(a) The term "Subject Data" as used herein includes all writings, technical information, and graphic or recorded material; and all information as to uses, products, processes, patents, inventions, and other materials (developed under the contract) specified to be delivered under this contract, whether or not copyrighted. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) The Contractor agrees to and does hereby grant to the Government a royalty-free, nonexclusive, and irrevocable license throughout the world to publish, translate, reproduce, deliver, perform, dispose of, and to authorize others so to do, all Subject Data now or hereafter covered by copyright: *Provided*, That with respect to the Subject Data now or hereafter covered by copyright and not originated in the performance of this contract, such license shall be only to the extent that the Contractor, its employees, or any individual or concern specifically employed or assigned by the Contractor to originate and prepare such Data under this contract, now has, or prior to completion or final settlement of this contract may ac-

quire, the right to grant such license without becoming liable to pay compensation to others solely because of such grant.

(c) The Government may use, duplicate, or disclose in any manner and for any purpose whatsoever, and have others so do, all or any part of the Subject Data delivered by the Contractor to the Government under this contract.

(d) The Contractor shall exert all reasonable effort to advise the Contracting Officer, at the time of delivery of such Subject Data, (i) of any invasions of the right of privacy contained therein and (ii) of all portions of such data copied from work not composed or produced in the performance of this contract. The Contractor shall also report to the Contracting Officer, promptly and in reasonably complete detail, each notice or claim of copyright infringement received by the Contractor with respect to all such Subject Data delivered under this contract.

(e) Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or any other right otherwise granted to the Government under any patent.

(f) The Government may modify, remove, obliterate, or ignore any marking not authorized by the terms of this contract on any subject data furnished hereunder, if

(i) The Contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the use of the marking; or

(ii) The Contractor's response fails to substantiate his contention that the use of the marking is authorized, in which case the Government shall give written notice to the Contractor.

(g) *Inclusion in subcontracts.* Except as otherwise authorized in writing by the Contracting Officer, the Contractor shall insert provisions identical to those contained in this clause in all subcontracts under this contract, unless previously authorized in writing by the Contracting Officer to vary the terms of the data clause to be included in the subcontract.

(c) The clause set forth in paragraph (b) of this section may be varied to permit the acquisition of limited rights in data in which an independent and valid proprietary interest exists.

(d) The clause set forth in paragraph (b) of this section may be amended by the addition of the following paragraph where publication by a third party of the subject data of the contract can be anticipated and where the third party will obtain the copyright. The clause, as amended, may be inserted in contracts where such use, in the opinion of the Contracting Officer, would be appropriate.

(h) The Contractor agrees that in the event of (i) an assignment of his rights in copyrighted matter hereunder to any third party or (ii) an assignment of rights in the subject data to any third party pursuant to which the assignee may secure a statutory copyright in his own name, the Contractor shall include in any such assignment provisions protecting the Government's rights in the subject data. Accordingly, the Contractor will not grant an exclusive license to the copyrighted matter to any third party, or assign the copyright to any third party without exempting therefrom and confirming therein the Government's existing license. In the event of the assignment of the Contractor's rights in the subject data hereunder which are not yet copyrighted, the Contractor will include provisions pursuant to which the assignee (i) will be notified of the Government's existing rights in the subject data under this contract and in addition, (ii) shall be obligated upon the issuance of any copyright to send to ACDA written confirmation of the Government's license to the copyrighted matter. This obligation of the Contractor to protect in any assignment the rights of the Government shall survive the expiration of the contract.

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AUTHORITY: Sec. 7(d), Dept. of HUD Act (42 U.S.C. 3535(d)).

SOURCE: 41 FR 55796, Dec. 22, 1976, unless otherwise noted.

§ 24-1.000 Scope of part.

This part describes the method by which the Department of Housing and Urban Development (HUD) implements, supplements and deviates from the Federal Procurement Regulations (FPR) through the establishment of the HUD Procurement Regulations (HUDPR), which prescribes the Department's procurement policies and procedures under the FPR System, in terms of authority, applicability, issuance and arrangement.

Subpart 24-1.1—Regulation System

§ 24-1.101 Scope of subpart.

This subpart establishes the Department of Housing and Urban Development Procurement Regulations (HUDPR) and states their relationship to the FPR System. It also provides the explanation of their purpose and the authorities under which they are issued.

§ 24-1.102 Purpose.

The Department of Housing and Urban Development Procurement Regulations (HUDPR) are hereby established as Chapter 24 of the Federal Procurement Regulations System (41 CFR Chapter 24) and are issued to provide uniform Departmental policies and procedures for the procurement of supplies, personal property and nonpersonal services as defined in HUDPR 24-1.202 by the Department's procuring activities and to make these policies and procedures readily available to Departmental personnel and to the public.

§ 24-1.103 Authority.

The HUDPR are prescribed by the Assistant Secretary for Administration under section 7(d) of the Department of HUD Act (42 U.S.C. 3535(d)), section 205(c) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)), and under the Secretary's delegation effective January 19, 1976, 41 FR 2665.

§ 24-1.104 Applicability.

All procurement of personal property and nonpersonal services (including construction) on behalf of the Secretary, except as may be otherwise authorized by law, must be accomplished in accordance with the HUDPR and the FPR:

(a) HUDPR implement, supplement, and in some instances may deviate from the FPR. Except as necessary to assure continuity or understanding, FPR material will not be repeated, paraphrased, or otherwise restated in HUDPR.

(b) Where HUDPR contain no material implementing the FPR, the FPR will govern.

(c) Except as specifically provided for herein, the HUDPR does not apply to the placement and administration of grants.

§ 24-1.105 Exclusions.

Certain HUD policies and procedures which come within the scope of this chapter nevertheless, may be excluded from HUD Procurement Regulations. The exclusions are categorized as follows:

(a) Policy or procedure which is expected to be effective for a period of less than (6) months.

(b) Policy or procedure of an internal nature which shall be issued as either a HUD Notice or a HUD Handbook.

§ 24-1.106 Arrangement.

§ 24-1.106-1 General plan.

Chapter 24 is divided in Parts, Subparts, Sections, Paragraphs and further subdivisions as necessary.

§ 24-1.106-2 Numbering.

Generally, the numbering system and part, subpart, and section titles used in HUDPR conform with those used in FPR or as follows:

(a) When HUDPR implement or deviate from a part, subpart, section, or paragraph of the FPR, that implementation or deviation will be numbered and captioned where possible to correspond to the FPR part, subpart, section or paragraph.

(b) Supplementary material published in the HUDPR will be assigned numbers from the number 50 onward which shall be used to denote the new appropriate part, subpart, section or paragraph of the HUDPR.

(c) Where material in the FPR required no implementation or deviation, there is no corresponding numbering in the HUDPR. Therefore, there may be gaps in the HUDPR sequence of numbers where the FPR, as written, are applicable to HUDPR and require no further implementation.

§ 24-1.106-3 Citation.

HUDPR will be cited in accordance with FEDERAL REGISTER standards approved for the FPR. Thus, this section, when referred to in HUDPR should be cited as "§ 24-1.106-3 of this chapter." When this section is referred to formally in official documents, such as legal briefs, it should be cited as "41 CFR 24-1.106-3." Any section of the HUDPR may be informally identified by the section number, e.g., "HUDPR 24-1.106-3."

§ 24-1.108 Deviation.

§ 24-1.108-1 Description.

The term deviation, which includes deviations from FPR as well as HUDPR, means:

(a) When a prescribed contract clause is set forth verbatim, use of a contract clause covering the same subject matter which varies from that set forth;

(b) When a standard or other form is prescribed, use of any other form for the same purpose;

(c) Alteration of a prescribed standard or other form, except as may be authorized in the Regulations;

(d) The imposition of lesser or, where the regulation expressly prohibits, greater limitations than are imposed upon the use of a contract clause, form, procedure, type of contract, or upon any other procurement action, including but not limited to, the making or amendment of a contract, or actions taken in connection with the solicitation of bids or proposals, award, administration, or settlement of contracts; and

(e) When a policy or procedure is prescribed, use of any inconsistent policy or procedure.

§ 24-1.108-2 Procedure.

In the interests of establishing and maintaining uniformity to the greatest extent feasible, deviations from the FPR or HUDPR shall be kept to a minimum and controlled as follows:

(a) In individual cases, deviations from the FPR or HUDPR may be submitted to the Assistant Secretary for Administration or the Director, Office of Procurement and Contracts for approval or other necessary or appropriate action. A supporting statement shall be submitted with the proposed deviation indicating briefly the nature of the deviation and the reason the deviation is necessary and in the best interest of the Government. The contract file shall include a copy of the request submitted and the approval. In emergency situations involving individual cases, deviation approvals may be processed by telephone and later confirmed in writing.

(b) In classes of cases, deviations from the FPR or HUDPR shall be submitted to the Assistant Secretary for Administration for his approval or other necessary or appropriate action. Requests for deviations shall be supporting by statements adequate to disclose fully the nature of the deviation and the need therefor. The Assistant Secretary for Administration will consider on an expedited basis jointly with GSA requests involving the FPR unless he determines, after due consideration of the objective of uniformity and the proper responsibilities of HUD, circumstances preclude such joint effort. In such cases, the Assistant Secretary for Administration will approve such class deviations as he determines necessary and GSA will be notified. Authorized class deviations will be reflected in HUDPR.

Subpart 24-1.2—Definition of Terms

§ 24-1.201 Scope of subpart.

This subpart contains definitions of terms used generally throughout HUDPR, in addition to those set forth in 41 CFR Subpart 1-1.2. Additional

definitions will be found in individual subparts of the FPR and HUDPR covering terms used in those subparts only.

§ 24-1.202 Definitions.

§ 24-1.202-1 Department.

"Department" means the Department of Housing and Urban Development, which may also be designated as "HUD."

§ 24-1.202-2 Secretary.

"Secretary" means the Secretary of Housing and Urban Development.

§ 24-1.202-3 Chief officer responsible for procurement.

The Director, Office of Procurement and Contracts is the Chief Officer responsible for procurement within the Department.

§ 24-1.202-4 Procuring activity.

"Procuring Activity" means those offices identified under § 24-1.451 which have authority delegated by the Secretary and redelegated by the cognizant official to purchase or contract for supplies, services and/or construction.

§ 24-1.202-5 Head of procuring activity.

"Head of Procuring Activity" as used in the HUDPR has the following meaning:

(a) *Director, Office of Procurement and Contracts* for HUD headquarters procurement;

(b) *The Assistant Regional Administrators for Administration* for regional office procurement;

(c) *The Director, Office of Property Disposition* for national contracts on acquired properties;

(d) *The Directors, Area and Insuring Offices* for decentralized procurement on acquired properties;

(e) *The Directors, Strategic Storage Centers* for procurement in support of the requirements for disaster temporary housing, storage, maintenance, repair and transport;

(f) *The Directors, Disaster Field Offices* for procurement of supplies and services in support of temporary housing for Presidentially-declared disaster areas; and

(g) *The Director, Office of Housing Programs* for contracts for the Consolidated Supply Program.

§ 24-1.202-6 Contractor.

"Contractor" means any person, firm, association, or corporation entering into a contract with the Government.

§ 24-1.202-7 Subcontractor.

"Subcontractor" means any person, firm, association, or corporation entering into a subcontract with a contractor or higher-tier subcontractor.

§ 24-1.202-8 Supplies and property.

"Supplies and Property" means materials and goods to be delivered to the Department under contracts or purchase orders.

§ 24-1.202-9 Personal services.

"Personal services" means the services of an officially appointed or employed individual engaged in the performance of authorized Federal functions under the supervision and direction of a Federal officer and paid for on a time or contract price basis. Personal services are acquired by HUD through consulting agreements which may only be executed by the HUD Headquarters Office of Personnel.

§ 24-1.202-10 Nonpersonal services.

"Nonpersonal services" means those services rendered by non-Government firms, institutions or persons through contract or agreement with the Department of Housing and Urban Development wherein no employee-employer relationship exists.

§ 24-1.202-11 Ratification.

"Ratification" means a subsequent confirmation in writing by an authorized HUD official of the placement of the type of order referred to in HUDPR 24-1.405 by a HUD official not authorized to do so.

§ 24-1.202-12 Primary organization heads.

"Primary Organization Heads" are those officials of the Department who are responsible for the major organizational components of HUD and who report directly to the Secretary or

Under Secretary. The Primary Organization Heads of HUD are: Assistant Secretary(ies), the General Counsel, the Deputy Under Secretary(ies), Federal Insurance Administrator, New Communities Administrator, Federal Disaster Assistance Administrator, Inspector General and Regional Administrator(s).

Subpart 24-1.3—General Policies

§ 24-1.301 Scope of subpart.

This subpart sets forth Departmental policies which are applicable to all procurements and provides general guidance on matters which include but are not limited to public information and disputes procedures.

§ 24-1.302 Procurement sources.

§ 24-1.302-1 General.

The procurement of supplies and services may be obtained from the following:

(a) *Government sources.* Procurement of certain supplies and services may be effected by orders on Government sources referred to in 41 CFR 1-1.302-1. It is the policy of the Department that following methods of procurement be utilized to the maximum extent practicable, in accordance with applicable laws and regulations:

(1) Excess and surplus stocks in the hands of any Government agency;

(2) Federal Supply Schedules;

(3) General Services Administration Stores Stock;

(4) Federal Supply Service Consolidated Purchase Programs;

(5) Federal Prison Industries, Inc.; and

(6) National Industries for the Blind.

(b) *Sources outside the Government.* Irrespective of whether the procurement of supplies or services from sources outside the Government is to be effected by formal advertising or by negotiation, competitive proposals ("bids" in the case of procurement by formal advertising, "proposals" in the case of procurement by negotiation) shall be solicited from all such qualified sources as are deemed necessary by the Contracting Officer to assure such full and free competition as is consistent with the procurement of the types of supplies and services necessary to meet the Department's requirements.

(c) *Other Federal Agencies as sources.* The Department may enter into agreements (called Interagency Agreements) with other Departments or Agencies of the Federal Government to acquire supplies or services that are available from such other Agencies.

§ 24-1.302-3 Contracts between the Department and Government employees.

Both prime contracts between the Government and its employees or business organizations substantially owned or controlled by Government employees, as well as any and all subcontracts thereunder, will not knowingly be entered into, except in those cases in which the needs of the Government cannot reasonably be otherwise supplied. The specific approval of the Assistant Secretary for Administration must be obtained for any such contract or subcontract.

§ 24-1.313 Records of contract actions.

Each procuring activity within HUD shall maintain an official record for each contract and purchase order issued. Each official procurement record shall constitute an independent history, documented to provide a complete chronology of all actions taken and shall contain all preaward and postaward actions in sufficient detail to explain and support the judgments of the Contracting Officer. In addition, official procurement records shall contain written documentation of all understandings, oral agreements and any other information pertinent to the transaction in the manner prescribed by each procuring activity.

§ 24-1.318 Disputes.

§ 24-1.318-1 Disputes clause.

Every contract awarded by the Department shall contain a Disputes Clause, as set forth in 41 CFR 1-7.102-12.

§ 24-1.318-2 Contracting officer's decision under a disputes clause.

When a disagreement of fact arising under the contract cannot be settled by agreement between the contractor and the Contracting Officer, the Contracting Officer shall then review all pertinent facts and issue a written final decision under the Disputes Clause. Such final decision must represent the independent judgment of the Contracting Officer and shall contain language substantially in accord with that set forth in 41 CFR 1-1.318-1. A copy of each Contracting Officer's decision under the Disputes Clause shall be furnished to the contractor by certified mail, return receipt requested, or in person, obtaining a receipt therefor.

§ 24-1.318-3 HUD Board of Contract Appeals.

The HUD Board of Contract Appeals has been established to hear, consider, and determine appeals from decisions of Contracting Officers pursuant to the clause entitled, "Disputes" of the contract. The HUD contract appeal procedure is set forth in 24 CFR Part 20.

Subpart 24-1.4—Procurement Responsibility and Authority

§ 24-1.400 Scope of subpart.

This subpart deals with the placement of procurement authorities and responsibilities within the Department, the selection and designation of Contracting Officers and the authorization of procuring activities.

§ 24-1.402 Responsibility of the Chief Officer responsible for procurement.

The chief officer responsible for procurement shall establish procurement policy throughout the Department and monitor the overall effectiveness and efficiency of the Department's procuring activities. The person exercising this authority shall establish adequate controls to assure compliance with applicable laws, regulations and procedures.

§ 24-1.404 Selection, designation and termination of designation of contracting officers.

§ 24-1.404-1 Selection.

In selecting Contracting Officers, the appointing authorities shall consider experience, education, training, business acumen, judgment, character, reputation and ethics. In the area of experience, education and training, the following shall be required unless contracting authority is limited to the simplified small purchase procedures.

(a) Experience, for appointment of an individual to a position having Contracting Officer authority, shall consist of a minimum of two years experience performing contracting procurement or purchasing operations in a government or commercial procurement office. Alternatively, where appointment of a Contracting Officer involves a specialized procurement field, experience in the field may be considered as a criteria for the appointment.

(b) Educational requirements for an individual in a position having Contracting Officer authority shall be, as a minimum, the equivalent of a Bachelor's Degree from an accredited college or institution preferably with major studies in Business Administration, Law, Accounting or related fields. Experience related to the field of procurement involved (e.g., supply construction, etc.), gained in a government or nongovernment procurement office, may be substituted for educational requirements when it is determined in writing and made a part of the appointment files (as stipulated in Subpart 24-1.404-2) that a potential appointee is otherwise qualified by virtue of extensive contract-related experience or training.

(c) Training requirements of an individual Contracting Officer or an individual appointed to a position having contracting authority shall include successful completion of training courses in Government Basic Procurement, of not less than 80 class hours, and Government Contract Administration of not less than 80 hours. These requirements may be waived by the Area Manager or Service Office Supervisor for Contracting Officers serving

the Acquired Property Program. Appointees or incumbents not meeting the special training requirements shall be given 24 months to acquire the minimum qualification standards.

(d) The selection requirements specified in (a) through (c) of this section are applicable to all permanent full-time (PFT) personnel whose primary duties are performed as a Contracting Officer as opposed to the individuals who supervise Contracting Officers, or to individuals who normally spend less than 10% of their time in the capacity of a Contracting Officer.

[45 FR 73657, Nov. 6, 1980]

§ 24-1.404-2 Designation.

(a) Appointment of Contracting Officers within the Department is normally accomplished by position in lieu of individual appointment. Whether appointment is by position or by individual, appointments below the level of Assistant Secretary shall be made in writing. Limitations on the scope of the authority to be exercised by the Contracting Officer, other than those contained in applicable laws and regulations (e.g., Code of Federal Regulations), shall be entered on the face of the appointment notification.

(b) Area Managers or Service Office Supervisors will execute a written affirmative statement that the individual, placed in the position to commit the Government as Contracting Officer, meets the selection criteria of the Federal Procurement Regulations and HUD Procurement Regulations. This statement shall be made part of the official personnel file of the Contracting Officer or the individual so selected or designated. The designation and statement shall be based on the size and complexity of contracts the individual will be required to execute and administer, and also shall consider any limitations on the scope of the authority to be exercised.

[45 FR 73658, Nov. 6, 1980]

§ 24-1.404-3 Termination of designation.

The established Contracting Officer authority exists as follows:

(a) *Automatic termination.* Unless the delegation of authority of a Contracting Officer contains provision for automatic termination, the delegation shall remain effective, unless revoked by the appropriate delegating authority. The authority of individuals designated as Contracting Officers by virtue of their position will be terminated upon their reassignment to another position in the Department or upon termination of their employment.

(b) *Revocation.* The delegation of authority for a Contracting Officer may be revoked in writing at any time by the delegating authority but no such revocation shall operate retroactively. Revocation of the delegation shall be published in the FEDERAL REGISTER.

(c) *Succession of authority.* Persons who succeed to a position designated as a Contracting Officer shall assume responsibility for the administration of all contracts entered into by their predecessors.

§ 24-1.405 Ratification of unauthorized contract awards.

Except as provided for under 41 CFR 1-1.405, no liability shall be incurred by the Government as a result of the actions of Departmental employees (other than Contracting Officers) which lead to unauthorized arrangements for the reimbursement of a contractor's pre-contract costs. Contracting Officers shall not ratify contractual commitments made by other personnel of HUD without the prior approval of the Head of the Procuring Activity.

§ 24-1.450 Contracting officer's representatives.

Contracting Officers may designate other Government employees to act as their authorized representatives for certain specific purposes of contract administration. Such designation shall be in writing and shall contain specific instructions as to the extent to which the representative has been given authority to take action for the Contracting Officer. A designation to act as a Contracting Officer may contain authority to sign contractual documents and approve invoices or vouchers. It may not include functions related to the procurement which are of a

technical nature including review and approval of work or research plans, techniques, and reports and which would normally be performed by the Government Technical Representative. Designations shall be effective only on a contract-by-contract basis. Designations which may be construed to apply to more than one contract must be approved by the Head of The Procuring Activity.

§ 24-1.451 HUD procuring activities.

HUD procures supplies and services (including construction) through the organizational elements specified in §§ 24-1.451-1—24-1.451-4.

§ 24-1.451-1 Office of procurement and contracts.

The Office of Procurement and Contracts, Assistant Secretary for Administration, is responsible for all Departmental procurement except as specified below.

§ 24-1.451-2 Housing.

The Assistant Secretary for Housing—Federal Housing Commissioner has overall responsibility for the following procuring activities:

(a) *Property disposition program.* Through the Property Disposition program, the Assistant Secretary for Housing—Federal Housing Commissioner is responsible for entering into and administering all procurement contracts with respect to all procurements of goods and services for the management, repair, improvement, alteration, demolition, maintenance, operation, rental, and sale or other disposition of all real and related property conveyed to or otherwise in the custody of the Secretary, including properties held by HUD as mortgagee-in-possession, and the publication of notices and adverisements in newspapers, magazines, and periodicals. This procurement operation is decentralized to specific positions at the Area and Insuring Office level. In addition, the Office of Property Disposition performs contracting functions through its Central Office Staff on all requirements having national applicability such as the acquisition of lock boxes and "for sale" signs.

(b) *Emergency preparedness—disaster relief program.* Through the Disaster Relief Program and mission assignment through the Administrator, Federal Disaster Assistance Administration, the Assistant Secretary for Housing—Federal Housing Commissioner is responsible for entering into and administering contracts within disaster areas relating to disaster temporary housing including the sale of emergency housing acquired pursuant thereto to occupants.

(c) *Emergency preparedness—strategic storage centers.* The procurement of supplies and services in support of the requirements to store, maintain, repair and transport disaster temporary housing (mobile homes and travel trailers) is conducted through the Strategic Storage Centers.

(d) *Consolidated supply program.* Through its consolidated supply program, the Assistant Secretary for Housing—Federal Housing Commissioner is responsible for entering into and administering contracts for voluntary use by public housing agencies in their purchase of certain supplies and equipment necessary in the operation and maintenance of low-income housing.

§ 24-1.451-3 General services divisions.

Procurement of supplies and services not exceeding $10,000 for HUD Regional requirements including support of the Federal Disaster Assistance Administrator, Regional Office, is accomplished at each Regional Office in the Administrative Services Division, Assistant Regional Administrator for Administration. In addition, the Regional Administrator may delegate authority to the Administrative Officers of the Area and Insuring Offices to execute FEDSTRIP and Imprest Fund transactions.

§ 24-1.451-4 Disaster field offices.

Each Disaster Field Office is responsible for the procurement of supplies and services to assist disaster areas through mission assignments by the Administrator, Federal Disaster Assistance Administration.

§ 24-1.452 Unauthorized actions in the administration of contracts.

Only Contracting Officers or duly authorized Contracting Officers representives acting within the scope of their authority may impose on a contractor any requirement which will affect price, period of performance or any other provisions of the contract. All contract changes must be directed in writing by a Contracting Officer or such Contracting Officer's representative.

§ 24-1.453 Contracting officers responsibilities to examine validity of procurement request.

Contracting Officers are charged with the responsibility of ascertaining that procurement actions do not violate any statutes, regulations or Department policies.

Subpart 24-1.6—Debarred, Ineligible and Suspended Bidders

§ 24-1.600 Scope of subpart.

Contractors and Grantees who have been debarred, suspended or made ineligible pursuant to 24 CFR Part 24 shall not be eligible for HUD contracts and will not receive solicitations therefor, subject to the requirements of 41 CFR 1-1.605-5.

Subpart 24-1.7—Small Business and Minority Business Concerns

§ 24-1.700 General.

This subpart implements and supplements general policies and procedures set forth in 41 CFR Subpart 1-1.7.

§ 24-1.702 Small business policies.

In addition to the policies prescribed in 41 CFR 1-1.702, HUD procuring activities shall cooperate with the Small Business Administration through the Department's small business advisor in the implementing the policies and procedures in 41 CFR Subpart 1-1.7 and in this subpart.

§ 24-1.705 Small business advisor.

The Director, Office of Procurement and Contracts is hereby designated as the Department's Small Business Advisor for all procurement matters. The Small Business Advisor is responsible for the establishment, implementation, and execution of the Small Business program. He is the central point of contact for inquiries concerning the Small Business program from industry, the Small Business Administration (SBA), the Congress, the Office of the Secretary, and others. His duties shall include developing a plan of operation to increase the share of contracts awarded to small business by the Department.

§ 24-1.706 Small business specialist.

The Director, Office of Procurement and Contracts, Director, Office of Property Disposition, Director, Office of Assisted Housing Management, Director, Strategic Storage Centers and each Assistant Regional Administrator for Administration for regional General Services Procurement shall each designate by name and in writing a Supervisory Small Business Specialist who shall either perform and/or supervise, and coordinate the duties of the Small Business Specialist(s) and act as the focal point for contact with the Small Business Advisor within their appropriate areas of assignment. Each head of a procuring activity shall designate by name or title and in writing a Small Business Specialist or Specialists for each procuring activity over which he exercises control to perform the duties set forth in this section. The Small Business Specialist appointed pursuant to HUDPR 24-1.706 shall perform such of the following duties as are appropriate for his procuring activity:

(a) Maintain a program designed to locate capable small business sources for current and future procurements;

(b) Coordinate inquiries and requests for advice from small business concerns on procurement matters;

(c) Review proposed solicitations for supplies and services, assure that small business concerns will be afforded an equitable opportunity to compete, and, as appropriate, initiate recommendations for small business set-asides;

(d) Take action to assure the availability of adequate specifications and

drawings, when necessary, to obtain small business participation in a procurement;

(e) Review proposed procurements for possible breakout of items suitable for procurement from small business concerns;

(f) Advise small business concerns with respect to the financial assistance available under existing laws and regulations and assist such concerns in applying for financial assistance;

(g) Participate in determinations concerning the responsibility of a prospective small business contractor;

(h) Participate in the evaluation of a prime contractor's small business subcontracting programs;

(i) Assure that adequate records are maintained, and accurate reports prepared, concerning small business participation in the procurement program;

(j) Make available to SBA copies of solicitations, when so requested; and

(k) Act as liaison between the contracting officer and the appropriate SBA office in connection with set-asides, certificates of competency, size classification, and any other matter in which the small business program may be involved.

§ 24-1.707 Procedures for initiating set-asides by the small business specialist(s).

All proposed procurements estimated to exceed $2,500 shall be reviewed by a Small Business Specialist for purposes of identifying those procurements which should be set aside in part or in total to small business, unless the Head of the Procuring Activity determines in accordance with 41 CFR 1-1.705-3(a) that such review would unduly delay the procurement process. The small business specialist shall initiate recommendations to the contracting officer for small business set-asides with respect to identifying individual procurements or classes of procurements or portions thereof.

§ 24-1.708 Review of set-aside recommendations initiated by small business specialist(s).

The Small Business Specialist may recommended that all, or a portion, of an individual procurement or class of procurements be set aside for small business, the Contracting Officer shall promptly either (a) concur in the recommendation, or (b) disapprove the recommendation, stating in writing his reasons for disapproval. If the Contracting Officer disapproves the recommendation of a Small Business Specialist, the Small Business Specialist may appeal to the Head of the Procuring Activity whose decision shall be final.

§ 24-1.709 Withdrawal or modification of set-asides.

A withdrawal or modification of an individual or class set-aside which was originally established upon the recommendation of the Small Business Specialist may be proposed by the Contracting Officer by giving notice, containing the reason for the proposed withdrawal or modification, to the Small Business Specialist. If the Small Business Specialist does not agree to a withdrawal or modification, he may appeal to the Head of the Procuring Activity whose decision shall be final.

§ 24-1.709-50 Small business class set-aside for construction, including repair and reconditioning.

A class set-aside is hereby made for each proposed procurement for construction, including repair and reconditioning, in an amount ranging from estimates of $2,000 to $1,000,000. Accordingly, Contracting Officers shall set aside for small business each proposed procurement in this range. If a Contracting Officer determines that any particular procurement falling within the class set-aside requirements of this section is unsuitable for such a set-aside in whole or in part, the set-aside may be withdrawn or modified in accordance with HUDPR 24-1.709. Proposed procurements for construction which exceed an estimate of $1,000,000 shall be considered for set-aside on a case-by-case basis.

[43 FR 8139, Feb. 28, 1978]

§ 24-1.709-51 Review of class set-aside program for construction, including repair and reconditioning.

The head of each procuring activity shall forward a semi-annual report on

class set-aside withdrawals to the Director, Office of Procurement and Contracts (OPC) as a part of the required Standard Form 37, Report on Procurement by Civilian Executive Agencies. The Director, OPC, acting as the Small Business Advisor, through the Supervisory Small Business Specialist, shall direct actions to be taken to improve small business participation under the class set-aside in § 24-1.709-50.

§ 24-1.713 HUD contracts with the Small Business Administration.

It is the policy of the Department to increase small business participation in its procurement program by awarding procurement contracts, whenever feasible, to the Small Business Administration (SBA) as authorized by section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

§ 24-1.714 HUD responsibilities and functions pursuant to section 8(a) of the Small Business Act.

The HUD responsibilities and functions pursuant to section 8(a) of the Small Business Act are as follows:

(a) *8(a) program responsibility.* The HUD Assistant Secretary for Fair Housing and Equal Opportunity is responsible for development and review of goals to be achieved under the 8(a) program and shall coordinate with each Primary Organization Head in establishing the level of HUD's participation in the 8(a) program and coordination with the Small Business Advisor to definitize HUD's plan for implementation of the 8(a) established goal(s). In conjunction with this responsibility for establishing 8(a) goals, the Assistant Secretary for Equal Opportunity shall make available to the Small Business Advisor 8(a) program guides for use by the Small Business Specialist and Contracting Officers in making determinations on individual procurements that should be processed as an 8(a) contract to be awarded to SBA.

(b) *8(a) procurement responsibility.* The procurement and contracting aspects of this program shall be the responsibility of the Small Business Advisor who shall assure that 8(a) procurement requirements are implemented through the Supervisory Small Business Specialist in each of their appropriate area of assignment.

(c) *8(a) functions of the small business specialist.* The Small Business Specialist and/or Supervisory Small Business Specialists, acting on behalf of the Small Business Advisor, shall screen proposed solicitations to determine the feasibility of placement under the 8(a) program as part of the performance of those duties set forth under HUDPR 24-1.706. The Small Business Specialist, after consideration of the goals and guidance established pursuant to paragraph (a) of this section, shall make recommendations for 8(a) procurement to the Contracting Officer who may, in his discretion, contract with the Small Business Administration in accordance with 41 CFR 1-1.705-7 and 1-1.713.

(d) *8(a) reporting requirements.* The Small Business Advisor shall report to the Assistant Secretary for Fair Housing and Equal Opportunity on a semiannual basis covering the activities of the 8(a) program which shall include the following:

(1) A narrative statement regarding the operation of the program during the 6-month period; and

(2) The number and dollar amount of awards made to small business under the 8(a) program.

In addition to the semiannual report to the Assistant Secretary for Fair Housing and Equal Opportunity, the Small Business Advisor shall also report annually to the General Services Administration on the current Standard Form 37 (SF-37), the number and dollar amount of awards made to small business under the 8(a) program. The SF-37 may be obtained from the Government Printing Office, Washington, D.C. or local Government supply outlets.

§ 24-1.715 HUD contracts with minority business firms.

§ 24-1.715-1 Applicability and scope.

This section sets forth the policy and procedures for contracting with minority business enterprises. A "minority business enterprise" is defined under 41 CFR 1-1.1310-2(b) as "a business, at least 50 percent of which is

owned by minority group members or, in case of publicly owned businesses, at least 51 percent of the stock of which is owned by minority group members. For the purposes of this definition, minority group members are Negroes, Spanish-speaking American persons, American-Orientals, American-Indians, American Eskimos, and American Aleuts."

§ 24-1.715-2 Authority.

Executive Order 11625 dated October 13, 1971, clarifies the authority of the Secretary of Commerce with respect to the development and coordination of a national program for minority business enterprise. In addition, the Executive Order requires each Federal department or agency to cooperate with the Secretary of Commerce in achieving the goals of the minority business program including the collection and furnishing of data and reports as required.

§ 24-1.715-3 Policy.

It is the policy of HUD to foster and promote the participation of minority business firms in the Department's procurement program and to offer guidance to such firms to the maximum extent practicable in order to enhance their ability to compete for the placement of HUD procurement contracts.

§ 24-1.715-4 Certification of status as a minority business enterprise.

All procuring activities shall request all interested contractors, bidders or offerors and sources utilized through small purchase procedures to complete on a voluntary basis a certification as to whether they are a minority business enterprise as defined under HUDPR 24-1.715-1. Completion of this certification is not a condition of eligibility for contract award.

RFQ/IFB/RFP No ———————————
Purchase Order/Contract No ———————————

U.S. Department of Housing and Urban Development additional certification of Status as a Minority Business Enterprise.

Offerors, bidders or suppliers are requested to complete, sign and attach this page, in single copy, to any bid, proposal or quote submitted under the Solicitation identified above. Completion of this certification is not a condition of eligibility for contract award.

The Bidder/Offeror/Supplier certifies that he (is) is not a minority business enterprise which is defined as a business, at least 50 percent of which is owned by minority group members or, in the case of publicly owned business, at least 51 percent of the stock of which is owned by minority group members. For the purpose of this definition, minority group members are Negroes, Spanish-speaking American persons, American-Orientals, American-Indians, American Eskimos, and American Aleuts.

(Name and title of person signing.)
Signature ———————————
Date ———————————

Subpart 24-1.50—Criteria for the Use of Grants or Contracts for Research

§ 24-1.5000 Scope of subpart.

This subpart establishes policies relating to the basic difference for using either a grant or contract in Departmental research efforts.

§ 24-1.5001 Policy.

Research grants may be made to support research at nonprofit organizations and educational institutions, State and local governments, and selected other organizations and persons when it is advantageous to the Government. FPR and HUDPR provisions relating to contract award are not applicable to awards of grants.

§ 24-1.5002 Criteria for use of grants and contracts.

The criteria set forth below provide guidelines to determine the appropriate type of instrument for use with grants and contracts.

(a) *Use of grants.* The factors that indicate the use of grants rather than contracts are:

(1) The primary purpose is to aid or support the acquisition of knowledge or understanding of the subject under study;

(2) The exact course of the work and its outcome are not precisely definable and specific points in time for achievement of significant results are not precisely specifiable; and

(3) The nature of the proposed investigation is such that the grantee will bear prime responsibility for the

conduct of the research, and exercise judgment and original thought toward attaining the goals within broad parameters of the research areas proposed and the related resources provided.

(b) *Use of contracts.* The factors that indicate the use of contracts rather than grants are:

(1) The primary purpose is to buy or procure well-defined research or development in direct support of a HUD program;

(2) The end product is a specific service, piece of hardware or improved performance of a specific service or piece of hardware;

(3) HUD considers it necessary to exercise a more stringent control over the objectives, direction, specifications, costs or methods of the research, and such control is desirable and feasible; and

(4) The end result is clearly defined and "specifications" are prepared in advance of the work.

PART 24-2—PROCUREMENT BY FORMAL ADVERTISING

Sec.

24-2.000 Scope of part.

Subpart 24-2.1—Use of Formal Advertising

24-2.150 Specification requirements.
24-2.150-1 General.

Subpart 24-2.2—Solicitation of Bids

24-2.201 Preparation of invitations for bids.
24-2.202 Miscellaneous rules for solicitation of bids.
24-2.202-1 Bidding time.
24-2.202-2 Telegraphic bids.
24-2.202-3 Place and method of delivery of supplies.
24-2.202-4 Bid samples.
24-2.202-50 Extension of time for bid opening.
24-2.202-51 Incorporation by reference.
24-2.202-52 Prebid conference.
24-2.202-53 Bid envelopes.
24-2.202-54 Alternate bids.
24-2.203-3 Publicity in newspapers and trade journals.
24-2.205 Bidders mailing list.
24-2.205-1 General.
24-2.205-2 Establishment of lists.
24-2.205-3 Removal and reinstatement of names on bidders lists.

Subpart 24-2.3—Submission of Bids

24-2.301 Responsiveness of bids.
24-2.303 Late bids.
24-2.303-1 General.
24-2.303-6 Notification to late bidders.
24-2.303-7 Disposition of late bids.

Subpart 24-2.4—Opening of Bids and Award of Contract

24-2.401 Receipt and safeguarding of bids.
24-2.402 Opening of bids.
24-2.402-50 Marking of bids.
24-2.402-51 Timing of acceptance and withdrawal.
24-2.404 Rejection of bids.
24-2.404-50 Rejection of bids in multiple bidding situations.
24-2.406 Mistakes in bids.
24-2.406-3 Other mistakes disclosed before award.
24-2.406-4 Disclosure of mistakes after award.
24-2.407 Award.
24-2.407-1 General.
24-2.407-7 Statement and certificate of award.
24-2.407-8 Protests against award.
24-2.407-50 Award when only one bid is received.
24-2.408 Information to bidders.

AUTHORITY: Sec. 7(d), Housing and Urban Development Act, (42 U.S.C. 3535(d)).

SOURCE: 41 FR 55801, Dec. 22, 1976, unless otherwise noted.

§ 24-2.000 Scope of part.

This part implements and supplements the basic requirements for procurement of personal property and nonpersonal services (including construction) by formal advertising, and establishes policies with respect to solicitation of bids, submission of bids and opening and evaluation of bids and, the awarding of contracts as set forth in 41 CFR 1-2.

Subpart 24-2.1—Use of Formal Advertising

§ 24-2.150 Specification requirements.

§ 24-2.150-1 General.

In addition to the requirements stipulated in 41 CFR 1-1.305, the specification shall be specific as to the objectives and the tasks to be performed, time of performance, Government-furnished materials and information, re-

porting requirements, measurements of progress, publications, and time periods for Government review. Generally the specifications shall be stated in detail and contain the following elements but shall always be written to meet the minimum that will also be acceptable:

(a) Objective.
(b) Scope of work.
(c) Specific tasks.
(d) Performance.
(e) Products/deliverables and schedules.
(f) Reports.
(g) Government obligations.

The adequacy of specifications is a critical factor in the use of formal advertising procedures. They must be defined well enough to permit all bidders to bid on the same basis. The Contracting Officer is responsible for determining when formal advertising is impractical or otherwise unsuitable and for documenting the file accordingly in the form of a determination and finding.

Subpart 24-2.2—Solicitation of Bids

§ 24-2.201 Preparation of invitations for bids.

Forms used in the preparation of invitations for bids are prescribed in 41 CFR Subpart 1-16.1 and 1-16.4 and in 24-16 of this Chapter.

§ 24-2.202 Miscellaneous rules for solicitation of bids.

§ 24-2.202-1 Bidding time.

In the procurement of supplies and services, the following shall be observed:

(a) Procurement action which does not provide for the minimum bidding time required by 41 CFR 1-2.202-1(c) shall be justified by the Contracting Officer prior to releasing the invitation for bids. This justification shall take the form of a finding of fact which establishes the Contracting Officer's basis for the exception to the minimum bidding time.

(b) The minimum bidding time stipulated in 41 CFR 1-2.202-1(c) shall not be construed as a maximum. Each prospective procurement shall be examined on its own merits to determine the bidding time that will facilitate competition on reasonable and equal terms. As a general rule, procurement of a less complicated nature for which no extensive bid preparation by the prospective bidder is required in development of his bid may contain a bidding time of 20 calendar days. Where the specification may require prospective bidders to develop drawings or samples, or to do extensive preparation in developing a meaningful bid, 30 calendar days or more of bidding time may be required. When similar types of requirements necessitate a quick turnaround time, the appropriate Procuring Activity may request a class exception to the minimum bidding time relating to the urgency for the supplies or services. If this situation exists, the Contracting Officer will make a request to the Head of the Procuring Activity for approval of the class exception or where internal Departmental regulations exist regarding exceptions to the minimum bidding time these regulations are construed as an exception under this Section.

§ 24-2.202-2 Telegraph Bids.

Telegraphic bids will be authorized only by the Contracting Officer who shall document the official procurement file as to the necessity of telegraphic bids. Conditions under which telegraphic bids may be authorized are set forth in 41 CFR 1-2.202-2. When telegraphic bids are authorized by the Contracting Officer, the following clause shall be incorporated in the Invitation for Bids:

Telegraphic bids may be submitted in response to this Invitation for Bids (IFB). Telegraphic bids must be received in this Office prior to the time specified for opening of bids. Such bids must specifically refer to this IFB; must include the items or subitems, quantities and unit prices for which the bid is submitted and the time and place of delivery; and must contain all the representations and other information required by the IFB together with a statement that the bidder agrees to all the terms, conditions and provisions of the invitation. Failure to furnish, in the telegraphic bid, the representations and information required by the IFBs may necessitate rejection of the bid. Signed copies of the IFBs must be furnished in confirmation of the telegraphic

bids. The bidder shall confirm the telegraphic bid on the required forms contained in the IFB and shall submit it to the Contracting Officer within five (5) calendar days after the time and date set forth in the IFB for receipt of all bid responses.

§ 24-2.202-3 Place and method of delivery of supplies.

To the maximum extent practical, invitations for bids issued by HUD shall stipulate "f.o.b. destination." Only where the Contracting Officer determines it to be in the Government's best interest may he deviate from this policy.

§ 24-2.202-4 Bid samples.

Bid samples submitted by bidders as required by an invitation for bids or as unsolicited samples if not returned in accordance with 41 CFR 1-2.202-4(h), shall be disposed of by the Contracting Officer who shall document the contract file as to the method of disposition.

§ 24-2.202-50 Extension of time for bid opening.

(a) Whenever such action is determined by the Contracting Officer to be in the best interest of the Government, bid openings may be rescheduled for a later date by issuance and distribution of an amendment (see 41 CFR 1-2.207) to the invitation for bids. Notices of change in bid opening date shall specify the exact time and date for the new opening and will be issued by mail or telegraph as soon as possible, but in any event prior to the time specified for the opening of bids.

§ 24-2.202-51 Incorporation by reference.

There shall be shown on the face of the invitation for bids or, if that sheet is not the primary one provided for the bidder's signature, on the primary sheet that is so provided, a listing of attachments which are to form a part of the bid invitation and resulting contract, as follows:

"The following attachments hereto form a part of this Invitation for Bids and any resulting contract:"

§ 24-2.202-52 Prebid conference.

Whenever a prebid conference is proposed for a procurement the following will be applicable:

(a) *General.* One of the essential elements of formal advertising is that all bidders are afforded an equal opportunity to compete. For this reason, discussions with prospective bidders will only be conducted by or with the knowledge and approval of the Contracting Officer. It is incumbent upon the Contracting Officer to afford to all prospective bidders the same information so as not to give one advantage over the others, if issued to only one potential bidder. The need for prebid conferences in advertised procurements should be infrequent and such conferences shall not be used as a substitute for formally amending defective or ambiguous solicitation or to disseminate additional specification requirements. The prebid conference is a procedure generally reserved for complex procurements to provide for discussion of unusual aspects. A prebid conference is only authorized when it is deemed by the Contracting Officer to be in the best interest of the Government and approved by the Head of the Procuring Activity or when written internal program policy requires it under certain specified circumstances.

(b) *Format.* The typical format of a prebid conference is a formal presentation by the Contracting Officer or his representative followed by a question and answer period. All prospective bidders and their subcontractors shall be invited to the meeting in a manner deemed appropriate by the Contracting Officer. When held, a prebid conference shall be scheduled sufficiently in advance of the date set for bid opening to permit prospective bidders to use the information. A written record of the prebid conference shall be made and maintained in the procurement file as the official record of what was presented at the conference.

(c) *Purpose.* A prebid conference is held to accomplish two primary objectives:

(1) To impart information that removes areas of performance uncertainties which, unless removed, result in higher price to the Government, i.e.,

inclusion in the bid of an amount for the uncertainty or contingency.

(2) To avoid post-award performance problems which firms could have been made aware of at the time of bid preparation.

(d) *Conclusion.* As a result of the prebid conference, it may become necessary to change or substantially clarify the solicitation. This action shall be transmitted to all those receiving IFB in the form of an official amendment to the solicitation, taking into consideration any extension of the closing date for the receipt of bids.

§ 24-2.202-53 Bid envelopes.

Mailing labels, tags, or envelopes, bearing "Postage and Fees Paid" indicia shall not be distributed with the invitation for bids or otherwise supplied to prospective bidders. To provide for ready identifcation and proper handling of bids, the Optional Form 17, "Sealed Bid Label" may be furnished with each bid set to inform the bidder as to what will be required on the bid envelope. 41 CFR 1-16.902-OF17 illustrates the referenced form and copies of same can be obtained from the General Services Administration.

§ 24-2.202-54 Alternate Bids.

An alternate bid is one that offers a suitable substitute for the requirements set forth in the invitation or which goes to the substance of the bid which affects price, quality, quantity or delivery. Where alternate bids are not provided for in the invitation, the Government shall consider any alternate bid to be non-responsive. The alternate bid method shall only be used in selected cases where flexibility may be desirable in selection of a product. The Contracting Officer shall weigh the advantage of the flexibility against the difficulties in the evaluation of bids that results from the alternate bid technique in determining to utilize this method.

§ 24-2.203-3 Publicity in newspapers and trade journals.

When it is deemed necessary by the procuring activity to use paid advertising the following must be observed:

(a) When it is deemed necessary to use paid advertisements in newspapers and trade journals and similar advertising media in conjunction with competitive solicitation, where HUD would not otherwise obtain the full benefit of available competition, written authority for such publication shall be obtained from the Head of the Procuring Activity.

(b) The prices paid for advertising shall not exceed commercial rates charged to private individuals. In Placing advertising orders, the Standard Form 1143 "Public Voucher for Advertising Order" shall be utilized. The only considerations required in placing an advertising order are (1) has the use of such medium been authorized and (2) is the medium able to achieve the objective of the advertising.

§ 24-2.205 Bidders mailing list.

§ 24-2.205-1 General.

Each procuring activity within the Department will establish in accordance with 41 CFR 1-2.205 bidders mailing lists to assure adequate sources of supplies and services. The Head of the Procuring Activity shall have the responsibility for establishing such mailing lists to enable all sources interested in contracting with the Department for specific types of programs to be utilized to the fullest extent possible.

§ 24-2.205-2 Establishment of lists.

All eligible Contractors who have submitted the Bidders Mailing List Application (Standard Form 129) or other forms as may be approved by the Department for this express purpose, shall be placed on the appropriate bidders mailing list unless a contrary determination is made in accordance with 41 CFR 2.205-1. The following procuring activities maintain mailing lists to support their particular procurement function:

(a) The Office of Procurement and Contracts maintains a list of all sources interested in contracting with all Departmental programs except as set forth in paragraphs (b) and (c) of this section.

(b) To assist the Property Disposition Acquired-Property Program, the

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Department's Area and Insuring Offices each maintains a mailing list of interested sources appropriate for the jurisdiction over which it has authority.

(c) The General Services Division of each HUD Regional Office maintains, appropriate for the jurisdiction over which it has authority, a mailing list of sources interested in contracting with the Department for general service types of procurement.

§ 24-2.205-3 Removal and reinstatement of names on bidders mailing lists.

Each procuring activity shall observe the following requirements for the removal and reinstatement of names on a mailing list:

(a) Contractors who have been suspended, debarred or otherwise determined to be ineligible in accordance with 24 CFR Part 24 to receive an award of a Government contract shall immediately be removed from the bidders mailing lists.

(b) Potential Contractors who have failed to respond to a solicitation, shall be removed unless retention is considered in the best interest of the Government.

(c) At least once every twelve (12) months potential Contractors on inactive bidders mailing lists shall be contacted to determine their continuing interest, and all who fail to respond to this inquiry may be removed from the mailing list.

(d) Potential Contractors, except for those who have been debarred or found ineligible, who have been removed from the mailing list, may be reinstated upon request or by filing a new mailing list application.

Subpart 24-2.3—Submission of Bids

§ 24-2.301 Responsiveness of bids.

Any bid which is not signed by the bidder or his authorized representative shall be disregarded, except when it is accompanied by other evidence which demonstrates the bidder's intention to be bound by the unsigned bid document. Examples of such evidence are a bid guarantee or a letter (which does not qualify or otherwise render the bid nonresponsive) signed by the bidder referring to and clearly identifying the bid itself. In such a case, the Contracting Officer may waive the deficiency as a minor informality or irregularity (see 41 CFR 1-2.405) and shall document the file to so indicate.

§ 24-2.303 Late bids.

§ 24-2.303-1 General.

The late bid regulations and procedures of 41 CFR 1-2.303 shall not be waived, even if a bid is only slightly late (e.g., several minutes) or none of the other bidders will be prejudiced by consideration of the late bid.

§ 24-2.303-6 Notification to late bidders.

In setting the date to be inserted in the notice to late bidders contained in 41 CFR 1-2.303-6, consideration should be given to the time required by the bidder to develop and prepare the required evidence in relation to the acceptance period specified by the otherwise apparent low bidder, avoidance of undue delay in the procurement cycle, and other pertinent factors. As a general rule, the bidder should be allowed a minimum of three (3) working days in addition to a time allowance for transmitting the notice to, and receipt of the evidence by, the Contracting Officer. The bidder shall be notified immediately in writing if his bid cannot be considered for award because of lateness.

§ 24-2.303-7 Disposition of late bids.

A late bid which is not for consideration shall be held unopened until after award and then returned to the bidder (unless other disposition is requested or agreed to by the bidder). The return of a late bid which cannot be considered for award shall be accompanied by a statement from the Contracting Officer that the bid was not considered because of its late receipt. If the late bid had to be opened for identification purposes or was opened by mistake, this fact shall be included in the statement from the Contracting Officer accompanying the returned bid. In all cases where a late bid is not considered and returned to the bidder, the file shall be documented with all information relating to the determina-

tion of late receipt which shall include a copy of the late bid envelope.

Subpart 24-2.4—Opening of Bids and Award of Contract

§ 24-2.401 Receipt and safeguarding of bids.

Envelopes, or other outer covering, containing identified bids, shall be stamped to show the Office of receipt, time and date. The bids shall immediately be turned over to the Contracting Officer who will be responsible for their safekeeping until the official opening. Each procuring activity shall be responsible for establishing procedures for the safeguarding of bids. Unidentified bids and bids that are opened by mistake shall be handled in accordance with 41 CFR 1-2.401(b). The Contracting Officer shall retain in the file a copy of the envelope, wrapper, or other container (bearing the required documentation) of a bid which was opened by mistake or which was opened for purpose of identification.

§ 24-2.402 Opening of bids.

The bid opening will be conducted by the Contracting Officer or his duly authorized representative designated as the bid opening officer. At the bid opening, the relative merits of any bids shall not be discussed by the person opening the bids, or the Contracting Officer, with the bidders, their representatives, casual observers, or Department personnel. No statement shall be made by the person opening the bid or the Contracting Officer at a bid opening bearing on the award, the possibility of a readvertisement, mistakes in bids, the responsiveness or responsibility of any bidder, etc. Oral instructions shall not be given to bidders at any time during the opening. Protests of bidders and inquiries regarding the award of the contract shall be referred to the Contracting Officer after the completion of the bid opening. Bidders are cautioned that information obtained at bid opening from other than the Contracting Officer may only be relied upon by the bidder at the bidder's own risk. After all bids have been opened, read aloud and recorded, the bid opening officer shall state that opening of bids has been completed.

§ 24-2.402-50 Marking of bids.

Under no circumstances will any individual make any marks or notations on the bid or its accompanying documents. Erasures and any other changes to the bid must be initialed by the individual executing the bid document. If such erasures or changes are not initialed, it shall be handled in accordance with 41 CFR 1-2.405. If through error or for some other reason marks are made on a bid or its accompanying documents by a Government employee, the markings should not be erased or eradicated; instead, the individual so marking the bid shall prepare a signed explanation of the marking for insertion in the file for future reference, showing when, how, and why the notations or markings were made. If the marked bid is accepted, explanation with regard thereto should be made on the statement of award.

§ 24-2.402-51 Timing of acceptance and withdrawal.

Bidders may not withdraw their bids after bid opening unless the notice of withdrawal was mailed prior to the time set for bid opening and handled in accordance with 41 CFR 1-2.305. The Contracting Officer's letter accepting the bid, when written acceptance is required, is effective when mailed. Therefore, a binding contract is effected where acceptance has been mailed by the Contracting Officer before the letter from the bidder advising of withdrawal of bid is received.

§ 24-2.404 Rejection of bids.

§ 24-2.404-50 Rejection of bids in multiple bidding situations.

When more than one bid is received from a person or firm, or affiliates thereof, in response to an invitation for bids, such bids shall be considered for award if responsive and otherwise acceptable. If the Contracting Officer determines that these bids would give a bidder an unfair advantage over other bidders or would otherwise be

prejudicial to the best interest of the Government, these bids will be rejected. When a tie situation occurs in which the requirement stipulated in 41 CFR 1-2.407-6 has to be applied, only one of the multiple bids shall be considered.

§ 24-2.406 Mistakes in bids.

§ 24-2.406-3 Other mistakes disclosed before award.

Mistakes in bid discovered prior to award (other than obvious clerical errors) shall be submitted to the following authorities for determinations in accordance with 41 CFR 1-2.406-3:

(a) Director, Office of Procurement and Contracts for all Departmental Programs, except as set forth in Item (b) below.

(b) Director of the appropriate Departmental Area or Insuring Office for the Property Disposition Acquired-Property Program.

Each determination made hereunder will be coordinated with the Office of General Counsel prior to notification to the bidder. The Contracting Officer shall be notified promptly of the course of action to be taken.

§ 24-2.406-4 Disclosure of mistakes after award.

Pursuant to 41 CFR 1-2.406-4(d), the Director, Office of Procurement and Contracts is delegated authority to make the determinations under 41 CFR 1-2.406-4. Mistakes in bids discovered after award shall be submitted to the Director, Office of Procurement and Contracts accompanied by the data set forth in 41 CFR 1-2.406-4(f). Each determination made hereunder will be coordinated with the Office of General Counsel prior to notification to bidder.

§ 24-2.407 Award.

§ 24-2.407-1 General.

Pursuant to 41 CFR 1-2.407-1, awards shall be made by mailing or otherwise furnishing to the successful bidder a properly executed award document or notice of award. A notice of award may be approved by the Contracting Officer for administrative reasons when the urgency for the contractor's immediate effort is required, e.g., the reproduction and distribution of the contract document may be delayed.

§ 24-2.407-7 Statement and certificate of award.

For each contract made by formal advertising, Standard Form 1036, Statement and Certificate of Award, or other appropriate document, shall be prepared and executed by the Contracting Officer and a copy retained in the contract file.

§ 24-2.407-8 Protests against award.

The following identifies the responsible agents and sets forth procedural requirements for handling protests, except for protests against awards under National Housing Act contracts. For the purpose of definition, as used in this section "working days" means the working days of the Agencies of the Federal Government, excluding Saturdays, Sundays and Federal holidays, as specified in 5 U.S.C. 6103.

(a) *Protest before award*—(1) *Resolution by procuring office.* Interested parties are urged to seek resolution of their complaints initially with the procuring activity. The Contracting Officer shall act on any protest filed with the procuring activity (see 41 CFR 1-2.407-8(a)) unless it is known that a protest has been filed concurrently with the General Accounting Office (GAO). Where a written protest is filed directly with the procuring activity, full consideration shall be given to the protest with the protestant notified in writing of the final decision on the protest within thirty (30) working days from the date of receipt by the Agency except where GAO views are required, in which case the time for rendering a decision shall be ten (10) working days from receipt of GAO views: Where the Contracting Officer makes a determination to award a contract notwithstanding a protest as authorized by 41 CFR 1-2.407-8(b)(4), the Head of the Procuring Activity shall approve such a determination prior to award. The appropriate official mentioned above shall notify the Office of General Counsel of intent to make award. Pursuant to 41 CFR 1-

2.407-8(b)(3), the Office of General Counsel shall notify the GAO of such proposed action. Parties interested in protesting directly to GAO, shall do so in accordance with the General Accounting Office Regulations 4 CFR Part 20.

(2) *Responsibility.* The Office of General Counsel has the responsibility for handling matters relating to protests against award of contracts within the Department of Housing and Urban Development and for liaison with the GAO. All communications concerning a protest written or otherwise directed to GAO shall be coordinated with the Office of General Counsel. All written communications from the Department to GAO shall be by the Office of General Counsel. The Contracting Officer has the responsibility for furnishing the Office of General Counsel with all information relating to the protest.

(3) *Times for filing.* The times for filing are as follows:

(i) Protests based on alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for the receipt of proposals shall be filed prior to the dates established in paragraph (a)(1) of this section. In other cases, protests shall be filed to be received in the Department of HUD or GAO not later than five (5) working days after the basis for protest is known or should have been known, whichever is earlier. Where such protest has been filed initially with the HUD's procuring activity any subsequent protest to the GAO must be delivered to the GAO within five (5) working days after notification of adverse action by HUD's procuring activity. GAO will consider the protest only if the initial protest was timely filed with the procuring activity.

(ii) Any additional statements by the protester in support of the protest to the GAO shall be mailed or otherwise furnished to the GAO, and two (2) copies sent to the procuring activity, no later than five (5) working days after filing of the initial protest.

(4) *Notice of protest and submission of report.* (i) Upon being advised by GAO of the receipt of a protest, the Office of General Counsel will inform the procuring activity immediately. The Contracting Officer shall promptly notify in writing the contractor or all bidders or offerors who, in the opinion of the Contracting Officer, appear to have a reasonable prospect of receiving an award if the protest is denied. Upon receipt by the Department of a written request for a formal report from the GAO relating to a protest, the Office of General Counsel shall make the complete formal report, or a written statement setting forth the reasons for any delay and the expected date of submission to GAO within twenty-five (25) working days, unless a different time is stipulated by GAO, after receipt of the GAO request. Except to the extent that withholding of information is permitted or required by law or regulations, copies of the protest and any supplemental information later filed by the protester may be furnished to the parties previously notified of the protest. These parties shall be advised to communicate directly with GAO if they desire to comment on the protest.

(ii) The report shall include the documents and statements required by 41 CFR 1-2.407-8(a)(2), identify the GAO file number assigned to the protest and shall be concurred in by the Contracting Officer. If appropriate, the report shall state the urgency of the procurement and the extent to which a delay in award may result in significant performance difficulties or additional expense to the Government. Where the statement of urgency is not appropriate, the report shall state the length of time an award may be delayed without significant expense or difficulty in performance. The report shall be transmitted by a covering letter addressed to the individual in GAO who signed the request and shall state that copies thereof have been sent to the protestant and any other named parties who have been given notice of the protest. The external distribution shall be shown on the original of the letter to GAO. In addition, letters shall be sent to the protestant and other interested parties enclosing a copy of the completed report and shall advise recipients that any comments shall be filed with the Office of General Counsel, General Accounting Office within ten (10) working days after receipt with copies to the procur-

ing activity and Office of General Counsel, Department of HUD.

(iii) If GAO requests additional information, a supplementary report shall be transmitted to GAO within five (5) working days after the Department receives the request and shall follow the procedures set forth in 24 CFR 2.407-8(a)(4).

(b) *Protest after award.* Protests initially received after contract award are subject to the procedure in this 24 CFR 2.407-8 and 41 CFR 1-2.407-8(c).

(c) *Responsibility for data.* The Office of General Counsel shall maintain records relating to all protests received. The records shall contain adequate data to show the number and nature of formal protests received (whether filed directly with the Department or with GAO), their disposition and the time for resolution. These records will be reviewed annually in order to update protest procedures.

§ 24-2.407-50 Award when only one bid is received.

When only one bid is received in response to an invitation for bids, such bid may be considered and accepted if the Contracting Officer makes a written determination that (a) the specifications were clear and not unduly restrictive, (b) adequate competition was solicited and it could have been reasonably assumed that more than one bid would have been submitted, (c) the price is reasonable, and (d) the bid is otherwise in accordance with the invitation for bids. Such a determination shall be placed in the file.

§ 24-2.408 Information to bidders.

On all contracts in excess of $5,000, except for the conditions stipulated in 41 CFR 1-2.408(a) (1) and (2), the unsuccessful bidders shall be given a notification of rejection by one of the methods set forth in 41 CFR 1-2.408(b).

PART 24-3—PROCUREMENT BY NEGOTIATION

Subpart 24—3.101—Exceptions to Normal Negotiation Procedures

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24-3.805-3 Procurements expected to exceed $250,000.

Subpart 24-3.51—Protests Against Award

24-3.5101 Negotiated procurement protests.

AUTHORITY: Sec. 7(d), Housing and Urban Development Act (42 U.S.C. 3535(d)).

Source: 41 FR 55805, Dec. 22, 1976, unless otherwise noted.

Subpart 24-3.101—Exceptions to Normal Negotiation Procedures

§ 24-3.101-50 Noncompetitive procurements.

(a) *General.* All departmental procurement shall be accomplished on a competitive basis to the maximum practical extent. Procurement without competition shall be limited to those circumstances where only one firm, organization or individual can provide the required supplies or services within the time required and at a reasonable price. Program offices recommending procurement on a noncompetitive basis shall submit a detailed summary of the factual circumstances supporting sole source procurement to the Contracting Officer. The Contracting Officer shall review the summary in accordance with the criteria outlined in paragraph (c) of this section. If, in the judgment of the Contracting Officer, the noncompetitive procurement is adequately supported, he shall prepare a document entitled "Justification for Noncompetitive Procurement." The document shall comply in all respects with the requirements of paragraph (c) of the section and be signed and inserted in the procurement file by the Contracting Officer.

(b) *Exclusions.* The provisions of this § 24-3.101-50 do not apply to: (1) Procurements of architect-engineer services; (2) procurement of utility services where the services are available from only one source; (3) 8(a) procurements with the Small Business Administration; or (4) purchases from mandatory Federal Supply Schedule contracts which list only one source.

(c) *Justification for noncompetitive procurement.* The document entitled "Justification for Noncompetitive Procurement" shall completely discuss the circumstances which render competitive negotiation impractical or not feasible and identify the exclusive capabilities which the proposed contractor possesses and which meet the requirements of the procurement.

(1) Factors which shall be considered in preparing the "Justification" include, but are not limited to, the following:

(i) The unique capability, highly specialized experience or facilities the proposed contractor possesses which is essential to provide the required supplies or services.

(ii) If time is of the essence, the experience, capabilities, or facilities the proposed contractor possesses which would enable him to complete the requirement within the time frame while all others would fail.

(iii) Whether the proposed contractor is the only one which can fulfill a requirement that the desired item be compatible with existing equipment or systems.

(iv) Whether the proposed contractor has a substantial investment of some nature which would have to be duplicated at excessive Government expense by another source entering the field.

(2) The Contracting Officer shall make the final determination as to the adequacy of the proposed sole source based upon consideration of all appropriate factors including any or all of those listed in § 24-3.101-50(c)(1).

§ 24-3.101-51 Unsolicited proposals.

(a) *Definition.* An unsolicited proposal is a written offer to perform work which is made to the Department by a prospective contractor without prior formal or informal solicitation. Such proposals are considered to be a means whereby sources outside the Government may propose pertinent and creative activities to the Department.

(b) *Policy.* It is the policy of the Department to accept the submission of unsolicited proposals.

(c) *Submission.* All unsolicited proposals for research shall be submitted in an original and five (5) copies to the Assistant Secretary for Policy Development and Research, Office of Program Planning and Administration, 451—7th Street, S.W., Washington, D.C. 20410. Unsolicited proposals for other than research shall be submitted in an original and five (5) copies to the Director, Office of Procurement and Contracts, 451—7th Street, S.W., Washington, D.C. 20410. Each propos-

al should contain a cover page with a one paragraph abstract and a statement as to where else in HUD or any other Federal Government agency the proposal has been sent. If the proposal contains technical data which the offeror wishes to restrict for evaluation purposes only, he shall mark the title page of the proposal with a legend stating substantially the following:

"Technical data contained in pages of this proposal shall not be used or disclosed, except for evaluation purposes, provided that if a contract or grant is awarded to this offeror as a result of or in connection with the submission of this proposal, the Government shall have the right to use or disclose this technical data to the extent provided in the contract or grant. This restriction does not limit the Government's right to use or disclose any data obtained from another source without restrictions."

The unsolicited proposal must include the following minimum information:

(1) A statement of the problem the proposal addresses including the need for the research.

(2) A brief outline of the work to be done in carrying out the project including a statement of objectives.

(3) An explanation of why, in terms of the proposed products, it is both important and urgent that the problem be addressed.

(4) A description of the approach selected and rationale for selection over other possible approaches.

(5) A brief itemization of relevant work known to have been undertaken in this area; either in process or completed, including references to any existing experience and data that could be used.

(6) A description of how the program results are anticipated to be translated into practice in terms of (i) the organization(s) involved and/or responsible and (ii) the steps remaining between program completion and implementation.

(7) The proposed starting and completion date and significant milestone dates.

(8) A proposed budget, including separate cost estimates for labor, materials, overhead, travel, subcontracts and other direct or indirect costs as appropriate.

(9) A commitment to provide cost-sharing and a statement as to the share to be borne by the contractor.

(10) Background descriptions of the persons expected to assume professional and administrative responsibility respectively for the project throughout its duration. Identification, to the extent possible, of the principal persons who would supervise and perform the project work; and explanation of how their experience and competence are related to the proposed activities.

(11) Current financial statement (certified through independent audit).

(12) Signature of a responsible official authorized to obligate the organization; and the time limit of the offer.

(d) *Evaluation.* The appropriate office designated in § 24-3.101-51(c) shall acknowledge receipt of the proposal and forward all but one (1) Copy to the appropriate program office for evaluation. If the offeror did not mark the proposal with the legend specified in paragraph (b) of this section, the appropriate receiving office shall place a cover sheet on the proposal and mark it as shown below, unless the offeror gives a clear written indication that he does not wish to impose any restrictions on the disclosure or use of the data contained in the proposal.

All Government personnel handling this proposal shall exercise extreme care to insure that the information contained herein is not disclosed outside the Government and is not duplicated, used or disclosed in whole or in part for any purpose other than to evaluate the proposal, without the written permission of the offeror. However, if a contract is awarded on the basis of this proposal, the terms of the contract shall control disclosure and use.

The appropriate program office shall conduct a thorough evaluation of the unsolicited proposal and furnish its comments and recommendations to the appropriate office designated in paragraph (c) of this section.

(e) *Procurement procedure.* The modes of procurement are identified as follows:

(1) *Competitive procurement.* A favorable technical evaluation of an unsolicited proposal is not, in itself, sufficient justification for negotiations on a noncompetitive basis with the of-

feror. If the substance of the proposal is available without restriction from another source, or its substance closely resembles that of a pending competitive solicitation or otherwise is not sufficiently unique to justify acceptance, HUD's policy of obtaining competition applies. When procurement is intended and competition is feasible, the unsolicited proposal shall be rejected by a letter from the appropriate office specified in § 24-3.101-51(c). A copy of such letter and associated unsolicited proposal shall be retained in the files of the appropriate receiving office. All other copies of the proposal shall be returned to the contractor.

(2) *Noncompetitive procurement.* When an unsolicited proposal has received a favorable technical evaluation and it is determined that the substance thereof is not available to HUD without restriction from another source, contains an original concept or idea, or competition is otherwise precluded, the subject matter of such unsolicited proposal may be procured from the offeror on a noncompetitive basis. The program office sponsoring the procurement shall support its recommendation with a summary of the circumstances warranting procurement on a noncompetitive basis. If, in the judgment of the Office of Procurement and Contracts, acceptance of the unsolicited proposal is adequately supported, the appropriate Contracting Officer shall prepare a document entitled: "Justification for Acceptance of an Unsolicited Proposal." The "Justification" shall include the findings set forth in paragraphs (e)(2) (i) or (ii) of this section.

(i) The procurement is for basic scientific or engineering research; and the unsolicited proposal was selected on the basis of its overall merit, cost and contribution to HUD's program objective, after a thorough evaluation and comparison with other proposals, solicited or unsolicited, in the same or related fields; or

(ii) The procurement is for services other than basic research (e.g., development, feasibility studies, etc.); the unsolicited proposal contains technical data or offers unique capabilities that are not available from another source or contains an original concept or idea; and it is not feasible or practical to define the Government's requirement in such a way as to avoid the necessity of using the technical data contained in the unsolicited proposal.

In addition, the "Justification" shall include the facts and circumstances that support the recommendation and operate to preclude competitive procurement. The "Justification" shall be signed by the Contracting Officer and inserted in the procurement file.

(f) An unsolicited proposal shall be returned to the offeror if, for any reason, the Government decides not to enter into a contract based on such proposal with the offeror. Return of the proposal shall be done in the same manner provided for return set forth in paragraph (e) of this section.

(g) Program offices receiving unsolicited proposals directly from offerors shall forward them to the appropriate office designated in paragraph (c) of this section for initial processing.

Subpart 24-3.103—Dissemination of Procurement Information

§ 24-3.103-1 Publicizing procurement actions.

The Department shall continually search for and develop information on sources (including minority and small business concerns) competent to provide supplies or services. Advance publicity, including use of the Commerce Business Daily to the fullest extent practicable, shall be given for this purposes. The search should include (a) a review of relevant data or brochures furnished by sources seeking to do business with the Department and (b) a cooperative effort by program personnel, small business specialists, and contracting officers to obtain information and recommendations with respect to potential sources and to consider the desirability of seeking other sources by publication of proposed procurements, in addition to the synopsis requirement. It is the responsibility of each procuring activity to use to the maximum extent practical its bidders' mailing list for soliciting competition. Applications for inclusion on the bidders mailing list may be ob-

tained from the appropriate procurement activity identified in HUDPR 24-1.451.

§ 24-3.103-2 Release of information during the solicitation phase.

No information shall be released during the solicitation phase of a procurement unless through the following methods:

(a) Each solicitation for a negotiated procurement shall specify an individual within the procuring activity who shall be responsible for responding to inquiries concerning the solicitation and evaluation of proposals resulting from the solicitation. All questions concerning the solicitation, whether of a procedural or substantive nature, shall be directed to the above individual. All other personnel will avoid exchange of comments with all offerors or potential offerors. Answers to questions requiring clarification of the substantive portion of the solicitation shall be provided by amendment to the solicitation, a copy of which shall be furnished to each recipient of the solicitation.

(b) Each procuring activity shall, in accordance with 41 CFR 1-1.1003-4, publish in the Commerce Business Daily the names and addresses of firms to whom solicitations will be issued when substantial subcontracting opportunities exist and it is not contrary to the Government's interest to publish them. The furnishing of this information in any other manner shall be at the discretion of the Contracting Officer.

§ 24-3.103-3 Release of information during the evaluation phase.

No information shall be released during the evaluation phase of a procurement unless through the following methods:

(a) During the course of evaluating proposals, personnel involved in this activity shall not reveal any information concerning the evaluation of proposals to anyone who is not also participating in the same evaluation proceedings, except as may be required for internal clearances.

(b) *Preaward notice of unacceptable offers.* In any procurement in which it appears that the period of evaluation of proposals is likely to exceed sixty (60) days, the Contracting Officer, upon determination that a proposal is unacceptable, shall provide prompt notice of the fact to the offeror submitting the proposal. In addition to stating that the proposal has been determined to be unacceptable, the notice to the offeror shall indicate, in general terms, the basis for such determination and shall advise that, since further negotiation with him concerning this procurement is not contemplated, a revision of his proposal will not be considered. Such notice need not be given if (1) in the judgment of the Contracting Officer, the disclosure will prejudice the Government's interest; (the possibility of protest shall not be considered prejudicial) or (2) if the proposed contract is to be awarded within a few days and notice pursuant to 41 CFR 1-3.103 would suffice.

(c) *Preaward notice—small businesss set-asides.* In any procurement involving a small business set-aside to be placed through conventional negotiation, upon final completion of negotiations and determinations of responsibility but prior to award, the Contracting Officer shall inform each unsuccessful offeror by written notice of the name and location of the apparently successful offeror(s). Each apparently unsuccessful offeror should be advised that any subsequent revisions of his proposal will not be considered, since no further negotiations are contemplated, and further pre-award contact with the Contracting Officer shall not be made with regard to the instant procurement unless the unsuccessful offeror has grounds to challenge the small business size status of the apparently successful offeror(s). This notification procedure shall not apply to procurements negotiated pursuant to 41 U.S.C. 252(c) (4), (5) or (6); negotiated with a foreign supplier when only foreign sources or supplies or services have been solicited; or urgent procurement actions which the Contracting Officer determines in writing must be awarded without delay to protect the public interest. The Contracting Officer's determination shall be placed in the contract file.

§ 24-3.103-1 Postaward release of procurement information.

Promptly after making award of any procurement in excess of $10,000, the Contracting Officer shall, if he has not done so pursuant to § 24-3.103-3(c) of this Chapter, give written notice to the unsuccessful offerors that their proposals were not accepted. The notice should name the successful contractor and state the amount of the award and the number of proposals received. Where additional information is requested by the offeror, debriefing will be conducted as follows:

(a) It is the policy of the Department to provide a debriefing to any unsuccessful offeror who makes a written request to the Contracting Officer within two (2) months after contract award.

(b) A debriefing is intended to:

(1) Tell an unsuccesful offeror which areas of his proposal were judged to be weak and deficient and whether the weaknesses or deficiencies were factors in his not having been selected.

(2) Identify the factors which were the basis for selection of the successful contractor. If the quality of the successful offeror's proposal to satisfy the mission requirement was the basis, the unsuccessful offeror should be so informed and given a general comparison of significant areas, but not a point by point comparison of all the elements considered in the evaluation criteria.

(c) A debriefing should not reveal:

(1) Confidential business information, trade secrets, techniques, or processes of the other offerors; and

(2) The relative merits or technical standing of the unsuccessful offerors or the scoring by the Source Evaluation Board or Technical Evaluation Panel.

(d) Any HUD official who receives from an unsuccessful offeror a request, written or oral, for a debriefing shall immediately refer the request to the appropriate procuring activity which shall make the necessary arrangements for the debriefing.

(e) It is essential that the debriefing be conducted in a scrupulously fair, objective and impartial manner, and that the information given be factual and consistent with the findings of the evaluation and the basis on which the source selection official made his decision.

(f) It is most important that all HUD personnel engaged in the evaluation and selection process be aware of the foregoing policies and procedures. Detailed and complete records will be maintained by key technical and business participants in a manner which will facilitate either a written or oral debriefing of any unsuccessful offeror's proposal.

§ 24-3.106 Preproposal conferences.

In cases of complex procurement, preproposal conferences may be used to explain complicate specifications and requirements to prospective offerors so as to permit them to submit proposals without undue expenditure of effort, time and money. The preproposal conference shall not be used as a method for prequalification of offerors, and may only be used when approved by the head of the procuring activity. The preproposal conference shall be arranged and conducted by the Contracting Officer or his representative, with participation by technical and legal personnel as appropriate. All prospective offerors shall be furnished identical information in connection with the proposed procurement. Remarks and explanations at the conference shall not qualify the terms of the solicitation and specifications. All conferees shall be advised that unless the solicitation is amended in writing it will remain unchanged and that if an amendment is issued, normal procedures relating to the acknowledgment and receipt of solicitation amendments shall be applied. A complete record shall be made of the conference.

Subpart 24-3.150—Treatment of Proposal Information

§ 24-3.150-1 General.

It is the general policy of HUD to use information contained in proposals only for evaluation purposes except to the extent such information is generally available to the public, is already the property of the Government or the Government already has unre-

stricted use rights, or it is or has been made available to the Government from other sources, including the offeror, without restriction.

§ 24-3.150-2 Disposition of unsuccessful proposals.

Unsuccessful proposals shall be disposed of as follows:

(a) *By the procuring activity.* Unsuccessful cost and technical proposals shall be retained in the procuring activity for a period of two (2) months subsequent to contract award as reference material for debriefings in accordance with HUDPR 24-3.103. Upon expiration of the two (2) month period, the procurement office shall destroy each unsuccessful proposal unless (1) a debriefing has been requested but not held or (2) a protest is pending concerning the procurement.

(b) *By the program office.* Unsuccessful proposals shall be retained on file in the program office which conducted the technical evaluation for a period of two (2) months subsequent to contract award. Upon expiration of the two (2) month period, the program office shall return all copies of each unsuccessful proposal not required for Departmental use to the procuring activity for destruction.

(c) Unsuccessful proposals shall not be used for other than internal reference unless (1) written permission has been obtained from the offeror or (2) the proposal expressly states that unrestricted use of the proposal is given to the Government regardless of its success in the competition or (3) any of the conditions described in HUDPR 24-3.150-1 exist.

§ 24-3.150-3 Use of successful proposals.

Successful proposals will be accorded unrestricted use by the Government unless the offeror places restrictions on the use of the proposal and the proposal is not incorporated in the resulting contract.

Subpart 24-3.4—Type of Contracts

§ 24-3.405-3 Cost-sharing contract.

(a) *Purpose.* This section implements Federal Management Circular No. 73-3 with respect to HUD contracts and sets forth basic guidelines governing cost sharing on research contracts with non-Federal organizations.

(b) *Basic guidelines.* (1) Cost sharing with non-Federal organizations shall be required or encouraged as provided below for the following contracts for basic or applied research:

(i) Cost-sharing shall be required for any contract which results from an unsolicited proposal.

(ii) A contract which does not result from an unsolicited proposal but in which the parties have nevertheless considerable mutual interest in the research (e.g., when it is probable that the performing organization or institution will receive significant future benefits from the research such as: Increased technical knowledge useful in future operations; additional technical or scientific expertise or training for its personnel; opportunity to benefit through patent rights; and the use of background knowledge in future production contracts).

(2) Cost sharing ordinarily shall not be applied to the following contracts:

(i) When the Contracting Officer has determined that:

(*a*) The research effort has only minor relevance to the non-Federal activities of the performing organization, which is proposing to undertake the research primarily as a service to the Government; or

(*b*) The performing organization has little or no non-Federal sources of funds from which to make a cost contribution; or

(*c*) The performing organization is predominately engaged in research and development and has little or no production or other service activities and is, therefore, not in a favorable position to make a cost contribution; or

(*d*) Payment of the full cost of the project is necessary in order to obtain the services of the particular organization.

(ii) The Contracting Officer shall include the substance of his determination in the negotiation summary. Contracts, except when cost-sharing is specifically directed by the Director, Office of Procurement and Contracts or voluntarily offered by the performing organization, for projects:

(a) Where a particular research objective or scope of effort is specified by HUD rather than proposed by the performing organization. This will usually include any formal solicitation for a specific contractual requirement.

(b) The principal purpose of which is the production of, or design, testing or improving of products, materials, devices, systems or methods.

(3) Guidelines for determining the amount of cost sharing:

(i) For educational institutions and other not-for-profit or non-profit organizations, cost sharing normally may vary from 1 percent to as much as 50 percent of the costs of the project. In some cases it may be appropriate for educational institutions to provide a higher degree of cost sharing, such as when the cost of the research consists primarily of the academic year salary of faculty members, or when the equipment acquired by the institution for the project will be of significant value to the institution in its educational activities.

(ii) The amount of cost participation by commercial or industrial organizations may vary from as little as 1 percent or less of the total project cost to more than 50 percent of total project cost, depending upon the extent to which the research effort is likely to enhance the performing organization's capability, expertise or competitive position and the value of such enhancement to the performing organization. It should be recognized that those organizations which are predominately engaged in research and development and have little or no production or other service activities may not be in a favorable position to derive a monetary benefit from the research under Federal agreements.

(iii) A fee or profit will usually not be paid to the performing organization if the organization is to contribute to the cost of the research effort, but the amount of cost sharing may be reduced to reflect the fact that the organization is foregoing its normal fee or profit on the research. However, if the research is expected to be of only minor value to the performing organization and if cost sharing is not required by statute, it may be appropriate for the performer to make a contribution in the form of a reduced fee or profit, rather than sharing the costs of the project.

(iv) Each cost-sharing contract negotiated by the Department shall contain the clause included in HUDPR 24-7.5011.

§ 24-3.408 Letter contract.

A letter contract is a written preliminary contractual instrument which authorizes immediate commencement of performance. Where this action is determined to be necessary, the following will be observed:

(a) *Application.* A letter contract may be entered into when (1) the interests of the Department demand that the contractor be given a binding commitment so that work can commence immediately, and (2) negotiation of a definitive contract in sufficient time to meet the procurement need is not possible as, for example, when the nature of the work involved prevents the timely preparation of definitive requirements, specifications, or cost data.

(b) *Limitations.* (1) A letter contract shall be used only after a written determination is made by the head of the procuring activity that the factors described in paragraph (a) of this section exist and that no other type of contract is suitable.

(2) A letter contract shall not be entered into without competition when competition is practicable. Where a letter contract award is based on price competition, an overall price ceiling representing the maximum amount of the definitized contract shall be included in the letter contract.

(3) A letter contract shall be superseded by a definitive contract at the earliest practicable date, but in no event beyond 90 calendar days after the date of the letter contract, unless the head of the procuring activity authorizes extension of the date for definitization.

(4) The maximum liability of the Government stated in the letter contract shall be limited to an amount determined to be essential to cover the contractor's requirements for funds up to the time the contract is definitized, but in no event shall exceed 50 percent

of the estimated cost of the definitive contract.

(c) *Content.* Letter contracts shall be specifically negotiated and, as a minimum, shall include agreement as to the following:

(1) The immediate commencement of performance of the contract by the contractor, including procurement of necessary materials;

(2) The extent and method of payments in the event of termination either for the convenience of the Government or for default;

(3) That the contractor is not authorized to expend monies or incur obligations in excess of the maximum liability of the Government as stated in the letter contract;

(4) The type of definitive contract anticipated;

(5) As many definitive contract provisions as possible;

(6) The contractor's obligation to provide such price and cost information as may reasonably be required by the Contracting Officer; and

(7) The prompt entry into good faith negotiations by the contractor and the Government to reach agreement upon and execute a definitive contract.

Subpart 24-3.6—Small Purchases

§ 24-3.601 Non-construction contracts.

The Department may use small purchase procedures in non-construction contracts when the aggregate amount involved in any one transaction does not exceed $10,000. Procedures used shall be in accordance with 41 CFR Subpart 1-3.6.

Subpart 24-3.7—Negotiated Overhead Rates

§ 24-3.702 General.

(a) When a contractor performs work in the same period under several contracts for one or more procurement activities or agencies, it may be desirable and appropriate, when mutually agreed to by the Department and the contractor, to negotiate uniform overhead rates for application to all such contracts in order to: (1) Effect uniformity of approach, (2) effect economy in administrative effort, and (3) Promote timely settlement of reimbursement claims.

(b) When the Contracting Officer determines that the above conditions exist, he shall include the negotiated overhead rate clause set forth in HUDPR 24-7.5008.

(c) If the prospective cost reimbursement contract is the only contract to be performed by the contractor for the Government during the same period or if the Contracting Officer determines that it is not appropriate to include the clause specified in HUDPR 24-3.702(b), determination of the reimbursable amount of the overhead under the contract shall be based upon final audit of the actual costs incurred during the period of performance and the clause set forth in HUDPR 24-7.5009 shall be included.

§ 24-3.707 Overhead ceilings.

When the Contracting Officer determines in accordance with 41 CFR 1-3.707 that it is appropriate to place an overhead ceiling in the contract, he shall include the clause set forth in HUDPR 24-7.5010.

Subpart 24-3.8—Price Negotiation Policy and Techniques

§ 24-3.801-2 Responsibility of contracting officer.

In the event a contractor insists on a price or demands a profit or fee which the Contracting Officer considers unreasonable and, if the Contracting Officer is unable to obtain a satisfactory solution after exhausting the causes of action set forth in 41 CFR 1-3.801-2(c), the matter shall be referred for resolution to the head of the procuring activity with a statement of facts and the Contracting Officer's recommendations.

§ 24-3.802 Preparation for negotiation.

(a) *Requests for proposals.* This section is not applicable to solicitations issued on Standard Form 33.

(1) Careful drafting of the Request for Proposals (RFP) is essential to the success of the competitive process. The program and procurement offices shall coordinate their efforts to develop a solicitation package which is free

of ambiguities and which will allow all offerors to propose on an equal basis.

(2) The RFP shall require that a proposal be submitted in two parts: A "Technical Proposal" and a "Business Proposal." Each of the parts shall be separate and complete in itself so that evaluation of one may be accomplished independently of and concurrently with evaluation of the other. The RFP shall provide that the technical proposal shall not contain any reference to cost. Resource information, such as data concerning labor hours and categories, materials, subcontracts, travel, computer time, etc., shall be included in the technical proposal so that the offeror's understanding of the scope of work may be evaluated.

(3) The instructions to the offerors concerning the business proposal shall require cost information in sufficient detail to allow a complete cost analysis. Categories and amounts of labor, materials, travel, computer time, as well as information with regard to contractor past performance, financial capacity, certifications and representations, and other pertinent administrative and business information should also be requested.

(4) The RFP shall contain factors for award which are tailored to the requirements of the particular procurement. Each technical factor and subfactor shall be assigned a numerical weight which shall appear in the RFP. These factors will serve as the standard against which all proposals will be evaluated.

(b) *Selection of prospective sources.* Proposals shall be invited from a sufficient number of competent potential sources to insure adequate competition. Sources solicited should include those individuals and organizations (1) on the source list provided by the program office; (2) on the procurement office's bidders' mailing list; and (3) requesting RFPs as a result of publication of the requirement in the Commerce Business Daily. Each RFP shall be made available to all prospective offerors at the same time and no offeror shall be given the advantage of advance detailed information concerning the proposed procurement.

(c) *Proposal preparation time.* HUDPR 24-2.202-1 Bidding Time is applicable to negotiated procurement under this subpart.

§ 24-3.805 Selection of offerors for negotiation and award.

§ 24-3.805-1 Policy.

Those competitively negotiated procurements not expected to exceed $250,000 or those procurements over $250,000 which the head of the procuring activity approves for less formal negotiation procedures, shall be processed in accordance with HUDPR 24-3.805-2. All other competitively negotiated procurements expected to exceed $250,000 shall be processed in accordance with HUDPR 24-3.805-3. This section is not applicable to procurement of Architect-Engineer Services.

§ 24-3.805-2 Procurements not expected to exceed $250,000.

On procurements where the expected dollar amount will not exceed $250,000 the following will be observed:

(a) *Forwarding proposals.* After the deadline for receipt of offers, the Contracting Officer will forward five (5) copies of the technical portion of each proposal to the Technical Evaluation Panel (TEP) for evaluation. The TEP will be composed of one or more technical personnel designated by the program or initiating office prior to issuance of the solicitation. The business portions of each proposal will be retained by the Contracting Officer for subsequent evaluation. The Contracting Officer shall inform the TEP of proposals which contain major business deficiencies, including out-of-line cost proposals, which discussion with the offeror could not reasonably be expected to cure.

(b) *Evaluation.* The TEP will evaluate each proposal in strict conformity with the factors for award set forth in the RFP, and will assign each proposal a score on the basis of the factors for award. The TEP shall identify each proposal as being either acceptable or unacceptable. A proposal shall be considered unacceptable if it is so clearly deficient that it cannot be corrected

through written or oral discussions. Predetermined cutoff scores designed for determining the threshold level of acceptablility of proposals shall not be employed.

(c) *Report.* A TEP report shall be prepared and signed by the technical evaluator(s), furnished to the Contracting Officer, and maintained as a permanent record in the official procurement file. The report shall reflect the scoring of each proposal and the rankings of the proposals, and shall identify each proposal as acceptable or unacceptable. The report shall also include a narrative evaluation specifying the strengths and weaknesses of each proposal, and any reservations or qualifications that may bear upon the selection of sources for negotiation and award. Specific technical reasons supporting a determination of unacceptablity with regard to any proposal shall be included. Score sheets of all panel members shall be appended to the report.

(d) *Review of report.* After submission of the TEP report, the Contracting Officer and the TEP will evaluate the business portion of each proposal.

(e) *Competitive range.* unless it is determined pursuant to 41 CFR 1-3.805-1(a)(5) that award shall be made on the basis of the most favorable initial proposal, the Contracting Officer will determine which offers are within the competitive range. A determination of the limits of the competitive range requires a comparison of the evaluation of each proposal against the evaluations of other proposals and therefore cannot be predetermined on the basis of a given number of or percentage of proposals. The competitive range shall include all proposals which have a reasonable chance of being selected for award.

(f) *Conduct of discussions.* The Contracting Officer, with the Technical Evaluation Panel, will conduct written or oral discussions of the work to be performed, the cost/price of the work, and other relevant points, with all those offerors within the competitive range. Discussions are not required if the conditions of 41 CFR 1-3.805-1(a)(5) are applicable. The Contracting Officer shall point out to each offeror the ambiguities, uncertainties, and deficiencies, if any, in his proposal which can be corrected without major changes to the proposal. He shall give each offeror a reasonable opportunity (with a common cutoff date for all) to support, clarify, correct, improve, or revise his proposal. Discussions with an offeror should disclose deficiencies in the proposal but should not identify approaches or ideas through which another offeror has achieved a higher evaluation. No information will be revealed by the Government which could give one offeror an unfair competitive advantage over another. Cost estimates made by the Government will not be disclosed.

(g) *Extent of discussions.* Careful judgment will be exercised in determining the extent of discussions. In some cases, good business practice may require more than one round of discussions with proposers within the competitive range depending upon the time constraints, the expense, administrative limitations, and the overall significance of the procurement.

(h) *Selection of contractor.* (1) After the close of discussions and receipt of any revisions to proposals, the TEP shall perform a final evaluation and prepare its selection recommendation(s). The TEP shall then forward the recommendation(s) through the appropriate officials having a need to know, as designated by the Funding Assistant Secretary, to the Contracting Officer who shall select for final contract negotiation the offer containing the proposal which promises the greatest value to the Government in terms of cost or price, technical and other factors, including equal opportunity compliance.

(2) Cost and price shall be considered in the selection of a contractor. This is particularly true where more than one acceptable offer from technically qualified sources remains for consideration after conduct of negotiations. If a lower priced, lower scored offer meets the Government's needs, acceptance of a higher priced, higher scored offer shall be supported by a specific determination by the Contracting Officer, that the technical superiority of the higher priced offer warrants the additional cost involved in the award of a contract to that of-

feror. Offers exceeding the Government's needs are not a basis for technical superiority.

(i) *Final negotiation and award.* Under a negotiated procurement, selection of the source or sources marks only the first phase of negotiating a definitive contract. Final contract negotiation entails: (1) Reaching agreement with the selected source on the costing/pricing, technical, equal opportunity and other provisions that will condition his performance under the contract; (2) setting forth these terms in a mutually acceptable contractual document; and (3) having sound rationale and basis for results negotiated.

(i) *Pre-negotiation conference.* Prior to negotiations with the selected offeror, the Contracting Officer shall conduct a meeting with those members of the Government's team who will participate. The purpose of this meeting is to present the objectives to be sought and to establish negotiating positions.

(ii) *Negotiation and award.* The Contracting Officer will make arrangements for negotiations with the successful offeror. Negotiations may be held at the contractor's site, at a HUD facility, or by telephone, depending upon the complexity and magnitude of the proposed contract, economic and time considerations and past experience. The Contracting Officer in coordination with assisted and supported by technical, audit, and other personnel as needed, making up the Government's negotiation team. It is the responsibility of the Contracting Officer in coordination with the Office of General Counsel to ensure the integrity of the negotiation process and to see to it that suitable mutual understandings between the parties have been reached. After negotiation is completed, the Contracting Officer will effect appropriate coordinations and execute the contract with a negotiation memorandum prepared in conformance with 41 CFR 1-3.811 and Office requirements.

§ 24-3.805-3 Procurements expected to exceed $250,000.

On those procurements where the expected dollar amount will exceed $250,000 the following will apply:

(a) Selection of the source or sources for final contract negotiations shall be made by the Contracting Officer, pursuant to his responsibilities under HUDPR 24-1.453, based upon the findings and recommendations of the Source Selection Official (SSO) who is the head of the funding office or his designee. To assist the SSO in evaluating proposals and making recommendations for selection, the SSO shall designate a Source Evaluation Board (SEB) composed of a chairman, voting members, and advisors.

(b) After the deadline for receipt of offers, the Contracting Officer will forward five (5) copies of the technical portion of each proposal to the SEB chairman or his designee, who shall be responsible for their custody throughout the evaluation process. The business portions of each proposal will be retained by the Contracting Officer pending initial technical evaluation by the SEB. The Contracting Officer shall inform the SEB of proposals which contain major business deficiencies, including out of line cost proposals, which discussion with the offeror could not reasonably be expected to cure.

(c) The SEB will evaluate each proposal in strict conformance with the factors for award of the RFP, and will assign each proposal a score on the basis of the factors for award. The SEB shall identify each proposal as being either acceptable or unacceptable. A proposal should be considered unacceptable if its deficiencies cannot be corrected through written and oral discussions to the point of having a reasonable chance of being selected for award. Predetermined cutoff scores designed for determining the threshold level of acceptability of proposals shall not be employed.

(d) After the initial technical evaluation, the Contracting Officer and the SEB will evaluate the business portion of each proposal.

(e) Unless the SEB is prepared to recommend pursuant to 41 CFR 1-

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3.805-1(a)(5) that award be made on basis of the most favorable initial proposal, the SEB shall establish a competitive range based upon the evaluation of all the factors for award including cost or price.

(f) The SEB shall conduct written or oral discussions with all proposers within the competitive range as outlined in HUDPR 24-3.805-2(f).

(g) After the close of discussions, receipt of any revisions to proposals and any final adjustments to proposal scores, the SEB shall prepare a written report of its findings and recommendations and submit it to the SSO for action. The report shall summarize all significant SEB actions in the solicitation and evaluation phases and include:

(1) *Statement of findings.* Each acceptable proposal shall be discussed in descending order of scores/rankings. The statement shall identify the strengths and weaknesses of each proposal and any appropriate information for the consideration of the SSO.

(2) *Recommendations.* The SEB shall provide recommendations to the SSO as to selection in terms of: (i) A single source; (ii) a number of equal sources; (iii) a number of sources in descending order; or (iv) options to be considered in arriving at the final decision. In making its recommendation the SEB shall consider the requirements set forth in HUDPR 24-3.805-2(h).

(h) Based upon the SEB report and his review of the matter, the SSO will recommend a source or sources and document ther basis for his recommendation. The SSO will communicate his findings and recommendation in a memorandum to the Contracting Officer. The memorandum will request the Contracting Officer to negotiate with the recommended source(s), and may include specific instructions and an alternate source or sources in the event the conduct of final negotiations so warrant.

(i) After receipt of the SSO's recommendation, the Contracting Officer shall select a source, based upon the findings and recommendations of the SSO for final negotiations in accordance with HUDPR 24-3.805(2)(h). Final negotiations and award will be effected in accordance with HUDPR 24-3.805-2(i).

Subpart 24-3.51—Protests Against Award

§ 24-3.5101 Negotiated procurement protests.

Protests against awards of negotiated procurement shall be processed in accordance with HUDPR 24-2.407-8.

PART 24-4—SPECIAL TYPES AND METHODS OF PROCUREMENT

Subpart 24-4.1—Automatic Data Processing Equipment and Services

Sec.
24-4.101 Clearance procedures.

Subpart 24-4.10—Architect-Engineer Services

24-4.1000 Scope of subpart.
24-4.1004-1 Establishment of Architect-Engineer evaluation boards.
24-4.1004-2 Conflict of interest.
24-4.1004-3 Privity of information.
24-4.1004-4 Maintenance and furnishing of source lists.
24-4.1004-5 Selection policy.
24-4.1004-6 Selection procedures.

AUTHORITY: Sec. 7(d), Dept. of HUD Act (42 U.S.C. 3535(d)).

SOURCE: 41 FR 55811, Dec. 22, 1976, unless otherwise noted.

Subpart 24-4.1—Automatic Data Processing Equipment and Services

§ 24-4.101 Clearance procedures.

No IFB, RFP, RFQ or amendment to an existing contract, when related in whole or in part to the procurement of ADP equipment or services, shall be issued until GSA approval is obtained pursuant to the FPMR.

Subpart 24-4.10—Architect-Engineer Services

§ 24-4.1000 Scope of subpart.

This subpart sets forth the policy and procedures to be followed for the establishment of architect-engineer evaluation boards and sets forth policy and procedures for the deliberations of the Board.

§ 24-4.1004-1 Establishment of Architect-Engineer evaluation boards.

Each architect-engineer evaluation board, whether permanent or ad hoc, shall consist of at least five (5) voting members who are Federal employees from the appropriate program area or from Federal offices outside the program area as appropriate. One member of each board shall be appointed Chairman. Five (5) alternate members who are Federal employees shall also be appointed, but at any given time the majority of voting members shall be from the program area concerned. The members of a permanent board shall be appointed for a period of two (2) years. Appointment shall be made by the following authorities with copies of appointment memoranda furnished to the appropriate procuring activity:

(a) Primary Organizational Heads for Boards appointed at the Headquarters level;

(b) Head of the Procuring Activity for Boards appointed at the Field Office level.

§ 24-4.1004-2 Conflict of interest.

Each board member, whether voting or nonvoting, shall familiarize himself with those provisions of Title 24, Housing and Housing Credit, Subtitle A, Part O, of the Code of Federal Regulations regarding conflicts of interest. If at any time during the selection process a Board member encounters a situation with one or more of the firms being considered that might be or might appear to be a conflict of interest, he will disqualify himself and call it to the attention of the Chairman for resolution and proper action. The Chairman will refer the matter to the Office of General Counsel.

§ 24-4.1004-3 Privity of information.

The Evaluation Board is to be insulated from outside pressures to the extent practical. No person having knowledge of the activities of the Board shall divulge information concerning the deliberations of the Board to any other persons not having a need to know such information.

§ 24-4.1004-4 Maintenance and furnishing of source lists.

The appropriate office utilizing architect-engineer services shall maintain a source list consisting of the current "U.S. Government Architect-Engineer Questionnaire," Standard Form 254 (SF-254), submitted by firms as defined in 41 CFR 1-4.1002 interested in performing work in the program area. For each procurement or group of related procurements the Board shall prepare from its source list a preselection list of ten (10) firms considered likely to be capable of meeting the requirements of the procurement. Every SF-254 shall be read and evaluated by at least two (2) Board members to determine which of the firms on the source list should be included on the preselection list. When a list of ten (10) firms is not available, fewer firms may be considered. SF-254's may be obtained from the General Services Administration.

§ 24-4.1004-5 Selection policy.

The selection of architect-engineering firms for professional service contracts shall be accomplished in accordance with the procedures set forth in this section. Such selection shall be based upon competitive evaluation procedures to determine which firm(s) is/are the most qualified. Qualification considerations include but are not limited to:

(a) Demonstrated specialized experience of the firm and key personnel in the area of expertise needed for the procurement.

(b) Capability and capacity of the firm to accomplish the work in the required period of time.

(c) Past experience of the firm with respect to performance of Federal contracts.

(d) Geographical location of the firm having working offices, capacity, and personnel to respond to the requirements of the procurement if geographical location is an important factor to the procurement.

§ 24-4.1004-6 Selection procedures.

The following procedures shall be used in the selection of architect-engi-

neering firms for all engineering contracts:

(a) For each requirement or group of requirements intended to result in a single contract, the Board shall review the qualifications and performance data for each of the firms on the preselection list, in accordance with the selection policy, including input from the program staff and shall select a minimum of three firms determined to have the highest qualifications. The procuring activity shall then mail letters of inquiry to those highest qualified firms regarding capability to perform the work, anticipated concepts, and the relative utility of alternate methods of approach.

(b) The replies to these letters shall be evaluated by the Board with each response being evaluated by at least three Board members. The SF-254's from the responding firms may also be reevaluated as necessary by three or more Board members. The firms queried will be reranked as necessary in accordance with the Board's evaluation.

(c) After the reranking, a Request for Contract Services shall be forwarded to the procuring activity. The authorities identified in HUDPR 24-4.1004-1 or his designee shall be the Source Selection Official. The SSO shall indicate the order of qualification, including capability, of the selected firms.

(d) The procuring activity shall send a Request for Proposal to the firm ranked highest on the list and if the proposal is acceptable shall intiate negotiations with that firm. If such negotiations are unsuccessful, contract negotiations shall then be commenced with the second most qualified firm. Failing accord with the second firm, contract negotiations shall be commenced with the third firm.

(e) All selection and negotiation proceedings shall be documented. All screening and evaluation sheets and meeting records are a part of the official record of the Board.

PART 24-7—CONTRACT CLAUSES

Sec.

24-7.000 Scope of part.

Subpart 24-7.5—Special Clauses

24-7.5007 Letter of credit.
24-7.5008 Negotiated overhead rates.
24-7.5009 Indirect costs (actual).
24-7.5010 Indirect costs (ceiling).
24-7.5011 Consideration and payment (cost-sharing).
24-7.5012 Reproduction of reports.
24-7.5013 Warranty.
24-7.5014 Coordination of Federal reporting requirements.
24-7.5015 Ocean freight shipments—use of American-flag vessels—reports.
24-7.5016 Lead based paint proscription.

AUTHORITY: Sec. 7(d), Housing and Urban Development Act (42 U.S.C. 3535(d)).

SOURCE: 41 FR 55812, Dec. 22, 1976, unless otherwise noted.

§ 24-7.000 Scope of part.

This part sets forth special contract clauses which are in addition to clauses set forth in 41 CFR Part 1-7 for use in connection with the procurement of personal property and nonpersonal services (including construction).

Subpart 24-7.5—Special Clauses

§ 24-7.5007 Letter of credit.

When advance payments are authorized and a letter of credit is to be used, insert the following clause:

LETTER OF CREDIT

a. The advance funds will be provided in accordance with the letter of credit procedure set forth in HUD Handbook 1900.4B or Handbook 1900.23 as appropriate. The Contractor shall use these procedures to obtain advance funds for allowable costs under this contract.

b. In accordance with those procedures, a Letter of Credit will be issued in an amount determined by the Contracting Officer based on the needs of the Contractor. Subsequent amendments to the Letter of Credit will be on the basis of an amendment to the contract. In no instance will advance funds provided by the letter of credit procedure exceed the amount of the contract as from time to time amended, less the amount of withholding provided therein.

c. The funds provided by the letter of credit procedure shall be solely for the pur-

poses of making payments for items of allowable cost as defined in this contract, or to reimburse the Contractor for such items of allowable cost and for making payments for such other costs as the Contracting Officer otherwise has authority to approve, and does approve in writing.

d. The Contractor may draw on the Letter of Credit using payment vouchers as follows:

1. Payment vouchers may be executed only for the purpose of obtaining funds in the minimum amount necessary for the following purposes:

(a) Making payments for items of allowable costs as defined in this contract; (b) reimbursing the Contractor for such items of allowable costs; and (c) for making payments for such other costs as the Contracting Officer otherwise has authority to approve, and does approve in writing; and the funds so obtained may be used only for such purposes.

2. Payment vouchers drawn shall be timed to be in accordance with the actual cash requirements of the Contractor in carrying out the purpose of the contract.

e. The Contractor may at any time repay all or any part of the funds or credit obtained under the Letter of Credit. When so requested in writing by the Contracting Officer, the Contractor shall repay to the Government such part of the balance of advance payments as shall, in the opinion of the Contracting Officer, be in excess of the Contractor's current needs.

f. If upon completion or termination of this contract all amounts obtained by the Letter of Credit have not been fully liquidated by authorized charges under the contract, the balance thereof shall be deducted from any sums otherwise due or which may be due to the Contractor from the Government, and any excess funds shall be repaid by the Contractor to the Government upon demand.

g. Notwithstanding any other provisions of this contract, the Contractor shall not transfer, pledge, or otherwise assign this contract or any interest therein, or any claim arising thereunder, to any party or parties, bank, trust company, or other financing institution.

h. Any and all advance payments made under this contract shall be secured by a lien in favor of the Government, paramount to all other liens, upon the supplies or other things covered by this contract and on all material and other property acquired for or allocated to the performance of this contract, except to the extent that the Government by virtue of any other provision of this contract, or otherwise, shall have valid title to such supplies, materials, or other property as against other creditors of the Contractor. The Contractor shall identify by marking or segregation all property which is subject to a lien in favor of the Government by virtue of any provision of this contract in such a way as to indicate that it is subject to such lien and that it has been acquired for or allocated to the performance of this contract. If for any reason such supplies, materials, or other property are not identified by marking or segregation, the Government shall be deemed to have a lien to the extent of the Government's interest under this contract on any mass of property with which such supplies, materials, or other property are commingled. The Contractor shall maintain adequate accounting control over such property on his books and records. If at any time during the progress of the work on the contract it becomes necessary to deliver any item or items and materials upon which the Government has a lien as aforesaid to a third person, the Contractor shall notify such third person of the lien herein provided and shall obtain from such third person a receipt, in duplicate, acknowledging, inter alia, the existence of such lien. A copy of each receipt shall be delivered by the Contractor to the Contracing Officer. If this contract is terminated in whole or in part and the Contractor is authorized to sell or retain termination inventory acquired for or allocated to this contract, such sale or retention shall be made only if approved by the Contracting Officer, which approval shall constitute a release of the Government's lien hereunder to the extent that such termination inventory is sold or retained, and to the extent that the proceeds of the sale, or the credit allowed for such retention on the Contractor's termination claim, is applied in reduction of advance payments then outstanding hereunder.

§ 24-7.5008 Negotiated overhead rates.

When it has been determined pursuant to HUDPR 24-3.702(a) that negotiated overhead rates should be used, insert the following clause:

Negotiated Overhead Rates

(a) Notwithstanding the provisions of the clause of this contract entitled "Allowable Cost, Fixed Fee, and Payment," the allowable indirect costs under this contract shall be obtained by applying negotiated overhead rates to bases agreed upon by the parties, as specified below.

(b) The Contractor, as soon as possible but not later than ninety (90) days after the expiration of his fiscal year, or such other period as may be specified in the contract, shall submit to the Contracting Officer, with a copy to the cognizant audit activity, a proposed final overhead rate or rates for that period based on the Contractor's actual cost experience during that period, together

with supporting cost data. Negotiation of overhead rates by the Contractor and the Contracting Officer shall be undertaken as promptly as practicable after receipt of the Contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with applicable Part 1-15 of Federal Procurement Regulations (41 CFR Part 1-15) as in effect on the date of this contract.

(d) The results of each negotiation shall be set forth in a modification to this contract, which shall specify (1) the agreed final rates, (2) the bases to which the rates apply, and (3) the periods for which rates apply.

(e) Pending establishment of final overhead rates for any period, the Contractor shall be reimbursed either at negotiated provisional rates as provided in the contract, or at billing rates acceptable to the Contracting Officer, subject to appropriate adjustment when the final rates for that period are established. To prevent substantial over or under payment, and to apply either retroactively or prospectively: (1) Provisional rates may, at the request of either party, be revised by mutual agreement, and (2) billing rates may be adjusted at any time by the Contracting Officer. Any such revision of negotiated provisional rates provided in the contract shall be set forth in a modification to this contract.

(f) Any failure by the parties to agree on any final rates under this clause shall be considered a dispute concerning a question of fact for decision by the Contracting Officer within the meaning of the "Disputes" clause of this contract.

§ 24-7.5009 Indirect costs (actual).

When it has been determined pursuant to HUDPR 24-3.702(c) that it is not appropriate to include the Negotiated Overhead Rates Clause, insert the following:

INDIRECT COSTS (ACTUAL)

In accordance with the "Allowable Cost, Fixed Fee, and Payment" clause of the contract, the Contractor shall be paid his actual overhead cost. Allowable overhead cost will be determined by the Contracting Officer in accordance with the principles set forth in 41 CFR Part 1-15. Any failure of the parties hereto to agree as to what constitutes actual overhead costs shall be considered a dispute covering a question of fact within the meaning of the clause of this contract entitled "Disputes."

§ 24-7.5010 Indirect costs (ceiling).

When it has been determined in accordance with 41 CFR 1-3-707 that it is appropriate to place an overhead ceiling in the contracts, insert the following clause:

INDIRECT COSTS (WITH CEILING)

(a) Pursuant to the provisions of the clause of this contract entitled, "Indirect Costs (Actual)," the following rates are established:

Period Cost Center Type Rate Base

(b) In addition to the principles for determination of costs set forth in the clause of this contract entitled "Indirect Costs (Actual)," the following special provision shall be applicable to this contract.

Final overhead rates shall not exceed ——% of the allowable direct labor dollars; provided, however, that in the event overhead rates developed by the cognizant audit activity on the basis of actual allowable costs are less than the ceiling overhead rate agreed to herein then the rates based upon those established by such cognizant auditor shall apply. The Government will not be obligated to pay any additional amounts on account of overhead above the ceiling overhead rate set forth above.

§ 24-7.5011 Consideration and payment (cost-sharing).

The following clause shall be inserted in each cost-sharing contract:

CONSIDERATION AND PAYMENTS

(COST-SHARING)

(a) The estimated cost for the performance of this contract is $——. The Contractor agrees to bear without reimbursement by the Government ——% of the cost for performance hereunder. Such cost sharing shall be effected as set forth in Paragraph (b) below.

(b) Public vouchers or invoices shall be submitted to the Contracting Officer in an original and five (5) copies and shall show the total cost incurred for the period for which the voucher or invoice is submitted, the cumulative total of costs incurred through the billing period, and the percentage of costs to be reimbursed by the Government. However, the Government is not obligated to reimburse the Contractor in excess of ——% of such amount. The Government shall not be obligated to reimburse the Contractor for the Government's share of the costs in excess of $—— nor is the Contractor obligated by this contract to expend his own funds in excess of $——.

§ 24-7.5012 Reproduction of reports.

Insert the following clause when the product of the contract is a report, data or other written material.

REPRODUCTION OF REPORTS

Reproduction of reports, data or other written material, if required herein, is authorized provided that the material produced does not exceed 5,000 production units of any page and that items consisting of multiple pages do not exceed 25,000 production units in the aggregate. The aggregate number of production units is to be determined by multiplying pages times copies. A production unit is one sheet, size 8 by 10½ inches or less, printed on one side only and in one color. All copy preparation to produce camera ready copy for reproduction must be set by methods other than hot metal typesetting. The reports should be produced by methods employing stencils, masters and plates which are to be used on single unit duplicating equipment no larger than 11 by 17 inches with a maximum image of 10¾ by 14¼ inches and are prepared by methods or devices that do not utilize reusable contact negatives and/or positives prepared with a camera requiring a darkroom. All reproducibles (camera ready copies of reproduction by photo offset methods) shall become the property of the Government and shall be delivered to the Government with the report, data or other written material.

§ 24-7.5013 Warranty.

When it has been determined that it is appropriate to place a warranty on equipment or services furnished under a contract, insert the following clause set forth below. Each construction contract shall incorporate an appropriate clause.

WARRANTY

The Contractor agrees that the supplies or services furnished by the Contractor under this contract shall be covered by warranties which are either standard or customary in the trade or are substantially similar to, and not in excess of, a standard or customary trade warranty. The Contractor shall furnish any warranty description at time of delivery. Supply packages shall be simply marked to show existence of the warranty, its expiration date and the company official to be notified.

§ 24-7.5014 Coordination of Federal reporting requirements.

The following clause shall be used when appropriate:

COORDINATION OF FEDERAL REPORTING REQUIREMENTS

In the event that it is a contractual requirement to collect information from ten or more public respondents the provisions of (44 U.S.C. Ch. 35, Coordination of Federal Reporting Requirements) shall apply to this contract. The Contractor shall obtain through the Government Technical Representative (GTR) the required Office of Management and Budget clearance before making public contact for the collection of data from public respondents or expending any funds for such collection. The authority to proceed with the collection of data and expenditure of funds therefore shall be in writing signed by the Contracting Officer.

§ 24-7.5015 Ocean freight shipments—use of American-flag vessels—reports.

The following clause shall be used when appropriate with the required report filed as set forth in paragraph (b) of this section.

(a) It is the policy of HUD to encourage and foster the American Merchant Marine. Pursuant to the provisions of section 901(b) of the Merchant Marine Act of 1936 (46 U.S.C. 1241) invitations for bids and requests for proposals shall in appropriate cases contain the following clause:

U.S.-FLAG VESSEL PROVISION

The Contractor agrees to ship on privately owned U.S.-flag commercial vessels at least 50 percent of the gross tonnage of any equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers) which may be transported on ocean vessels. Pursuant to section 901(b) of the Merchant Marine Act, 1936, as amended (46 U.S.C. sec. 1241(b)), the Secretary or his duly authorized representative may permit shipment in a manner other than that required by this provision upon the basis of evidence furnished by the contractor that U.S.-flag commercial vessels. The Contractor will be required to certify compliance with this requirement prior to final payment. For purposes of this section, the term "privately owned U.S.-flag commercial vessels" shall not be deemed to include any vessels which, subsequent to September 21, 1961, shall have been either: (a) Built outside the United States, (b) rebuilt outside the United States, or (c) documented under any foreign registry, until such vessel shall have been documented under the laws of the United States for a period of 3 years.

(b) Each affected office shall submit to the Chief, Office of Market Development, Cargo Preference Control Center, Maritime Administration, U.S. Department of Commerce, Washington, D.C. 20235, a report as follows: Within 20 working days of the date of loading for each shipment originating in the United States, or within 30 working days for each shipment originating outside the United States, a report consisting, where obtainable, of a properly notated and legible copy in English of the ocean bill of lading. If a copy of the bill of lading is unobtainable or not in English, the report shall be made in the following format.

U.S. Department of Housing and Urban Development:
Office ———————————
Date ———————————
Cargo preference shipment report:
Vessel name ———————————
Vessel flag ———————————
Date of loading ———————————
Port of loading ———————————
Port of final discharge ———————————
Commodity description ———————————
Gross weight in pounds ———————————
Total ocean freight revenue in U.S. dollars

———————————

§ 24-7.5016 Lead based paint proscription.

In accordance with the requirements of the Lead Based Paint Poisoning Prevention Act of July 1, 1973, and 24 CFR, Part 35, every construction or rehabilitation contract and subcontract which includes painting shall contain the following provisions for the restricted use of lead based paints:

The Contractor agrees that exterior and/or interior paints, enamels, and/or primers used on any surface in residential structures constructed or rehabilitated under this contract shall not contain more than ½ of one (1) percent lead by weight (calculated as lead metal) in the total nonvolatile content of liquid paints.

PART 24-11—FEDERAL, STATE, AND LOCAL TAXES

Subpart 24-11.1—State and Local Taxes

Sec.
24-11.105 Resolution of tax problems.

Subpart 24-11.4—Contract Clauses

24-11.401-4 Matters requiring special consideration.

Subpart 24-11.1 State and Local Taxes

§ 24-11.105 Resolution of tax problems.

In order to have uniformity in HUD's treatment of the tax aspects of a contract and to insure effective cooperation with other Government agencies on tax matters of mutual interest, the Office of General Counsel has the responsibility within HUD for handling all tax problems. Therefore, the procuring activity will not engage in negotiation with any taxing authority for the purpose of determining validity or applicability of, or obtaining exemptions from or refund of, any tax. When a problem exists, the Contracting Officer shall request in writing the Office of General Counsel's assistance. The request shall detail the problem and be accompanied by appropriate backup data. The Office of General Counsel shall report to the Contracting Officer as to the necessary disposition of the tax problem. The Contracting Officer will notify the contractor of the outcome of the tax problem. The Office of General Counsel shall have the responsibility for communications with the Department of Justice for representation or intervention in proceedings concerning taxes.

(Sec. 7(d), Housing and Urban Development Act (42 U.S.C. 3535(d)))

[41 FR 55813, Dec. 22, 1976]

Subpart 24-11.4 Contract Clauses

§ 24-11.401-4 Matters requiring special consideration.

When Government-furnished property is involved in a proposed contract, it is the Department's policy to follow

the requirements set forth in 41 CFR 1-11.401-4(a), (b), (e) and (f) and insert the clause set forth in 41 CFR 1-11.401-4(c) in all proposed contracts.

(Sec. 7(d), Housing and Urban Development Act (42 U.S.C. 3535(d)))

[41 FR 55813, Dec. 22, 1976]

PART 24-13—GOVERNMENT PROPERTY

Sec.

24-13.000 Scope of part.

Subpart 24-13.1—General

24-13.100 Scope of subpart.
24-13.101 Relationship of Federal Property Management Regulations (FPMR) to HUDPR .
24-13.102 Definitions.
24-13.103 Responsibility and liability for Government property.
24-13.103-1 Prime contractors.
24-13.103-2 Subcontractors.
24-13.104 Profits and fees.
24-13.105 Use for or by contractors of property owned and operated by the Government.

Subpart 24-13.2—Material

24-13.200 Scope of subpart.
24-13.201 Policy.
24-13.202 Procedure.
24-13.203 Disposal.

Subpart 24-13.3—Providing Government Property to Contractors

24-13.300 Scope of subpart.
24-13.301 Providing property.
24-13.301-1 Special and general purpose property.
24-13.301-2 Providing property when disposal is limited.
24-13.301-3 Changing Government property to be provided.

Subpart 24-13.4—Use and Charges

24-13.400 Scope of subpart.
24-13.401 General.
24-13.402 Use without charge.
24-13.403 Charges.

Subpart 24-13.5—Competition

24-13.500 Scope of subpart.
24-13.501 General.
24-13.502 Solicitation documents.
24-13.503 Evaluation of bids and proposals.

AUTHORITY: Sec. 7(d), Housing and Urban Development Act (42 U.S.C. 3535(d)).

SOURCE: 41 FR 55814, Dec. 22, 1976 unless other noted.

§ 24-13.000 Scope of part.

This part sets forth policies and procedures with respect to providing Government property for use by HUD contractors in connection with the procurement of personal property and nonpersonal services (including construction), and prescribes applicable contract clauses.

Subpart 24-13.1—General

§ 24-13.100 Scope of subpart.

This subpart sets forth material concerning the definitions of HUD property, its use under prime and subcontracts, and its relationship to Federal Property Management Regulations (FPMR).

§ 24-13.101 Relationship of Federal Property Management Regulations (FPMR) to HUDPR.

This Part 24-13 of the HUDPR establishes policy for the control, use and maintenance of Government property under prime and subcontracts and is intended to implement and supplement the FPMR 41-CFR Part 101, to the extent that is necessary to carry out the requirements of public policy relating to Government property. This part does not apply to the repair, rehabilitation, management or sale of Secretary-acquired property.

§ 24-13.102 Definitions.

For the purpose of this part, the following terms have the meanings set forth in this section.

(a) *Property.* Property includes all property except Secretary-acquired property, both real and personal, severable and nonseverable, and expendable material and nonexpendable equipment. Secretary-acquired property means all real and personal property under legal custody of the Secretary whether or not title to the property vests in the Secretary.

(b) *Government property.* Government property includes all property as to which title is vested in the Government.

(c) *Government-furnished property.* Government-furnished property is Government owned or leased property in the possession of the contractor.

(d) *Contractor-acquired property.* Contractor-acquired property is property procured or otherwise obtained by the contractor through sources other than the Government for performance of a HUD contract.

(e) *Contractor inventory.* Contractor inventory is (1) any property acquired by and in the possession of a contractor or subcontractor (including Government-furnished property) under a contract pursuant to the terms of which title is vested in the Government; and (2) any property which the Government by contract clause is obligated or has the option to take over under any type of contract.

(f) *Provide.* "Provide" means to furnish Government-owned property or to allow a contractor to acquire property at Government expense.

(g) *Nonseverable.* "Nonseverable" means that such property cannot be removed after erection or installation without substantial loss of value or damage thereto, or to the premises where installed.

(h) *Dollar value.* "Dollar value" is the amount determined by the Government and recorded by the Department in its inventory records as the acquisition cost of an item of Government-owned property.

(i) *Material.* "Material" means property which may be consumed or expended in the performance of a contract or which may be incorporated into or attached to an end item to be delivered under a contract. It includes, but is not limited to raw and processed material, parts, components, assemblies, small tools and supplies which may be consumed in normal use during performance of a contract.

(j) *Nonprofit organization.* "Nonprofit organization" means any firm organized not-for-profit which represents that no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(k) *Equipment.* The term "equipment" means any item of mechanical, electronic, medical, technical, or scientific property as well as office furniture and machines having a useful life expectancy of 1 year or more.

(l) *Facilities contract.* "Facilities contract" means a contract for the use of Government real and/or personal property which is provided to a contractor or subcontractor for use in connection with a separate contract or contracts for supplies, research, training, or other articles or services.

§ 24-13.103 Responsibility and liability for Government property.

§ 24-13.103-1 Prime contractors.

It is the policy of the Government, with the exception of advertised fixed price contracts, not to hold a contractor responsible for loss of property except for loss, destruction, or damage resulting from willful misconduct or lack of good faith of any of the contractor's personnel to maintain and administer the program for maintenance, repair, protection and preservation of the property.

§ 24-13.103-2 Subcontractors.

If Government property is provided to a subcontractor directly by the Government or by the prime contractor, the policy set forth in HUDPR 24-13.103-1 shall apply. Prior to the Contracting Officer approving the inclusion of the provisions allowing the prime contractor to provide Government property to a subcontractor, he shall balance the need for the protection and care of Government property against the cost thereof. A prime contractor who provides Government property to a subcontractor shall not be relieved of any responsibility to the Government that he may have under the terms of his contract.

§ 24-13.104 Profits and fees.

No fee is to be provided or allowed a contractor under a facilities contract. Where Government property is provided under a facilities contract, profit or fee terms shall be considered in the negotiation of the related procurement contract or contracts for products or services consistent with the profit guidelines set forth in 41 CFR 1-3.806.

§ 24-13.105 Use for or by contractors of property owned and operated by the Government.

The on-site use for or by contractors of existing Government-owned property (such as test and other facilities) located at installations owned and operated by the Government may be authorized in connection with the performance of Government contracts only when:

(a) There is no commercial capability adequate for the needs; or

(b) Substantial cost savings will result from use of the Government-owned property.

Whenever any such use is authorized, adequate consideration comparable to commercial charges, if any, shall be obtained under any affected contract.

Subpart 24-13.2—Material

§ 24-13.200 Scope of subpart.

This subpart sets forth policy and procedure for furnishing material (see HUDPR 24-13.102(i) to contractors for performance of HUD formally advertised and negotiated contracts.

§ 24-13.201 Policy.

Contractors normally are expected to furnish all material for performance of HUD contracts. However, it may be in the Government's interest to furnish such material when justified by reason of economy, to expedite contract performance, to achieve standardization, or under other appropriate conditions.

§ 24-13.202 Procedure.

Solicitation documents shall describe material to be furnished by the Government in detail sufficient for evaluation by prospective contractors. Further, whenever material is to be furnished by the Government, the contract shall specify whether the contracting activity or the contractor is to prepare requisitioning documents. If the contractor is to be responsible for preparing requisitioning documents, the contractor shall prepare such documents in accordance with the Federal Standard Requisitioning and Issue Procedure (FEDSTRIP) system, prescribed by 41 CFR Subpart 101-26.2. (See 41 CFR Subpart 1-5.9. *Use of GSA Supply Services by Contractors Performing Cost-Reimbursement Type Contracts.*) The appropriate clause for Cost-Reimbursement and Fixed Price contracts shall be incorporated.

§ 24-13.203 Disposal.

Residual Government material (including scrap and salvage) shall be disposed of in accordance with instructions of the Contracting Officer.

Subpart 24-13.3—Providing Government Property to Contractors

§ 24-13.300 Scope of subpart.

This subpart sets forth policy to guide the decision-making process when property (other than material) is to be provided a contractor for performance of a HUD contract and to insure that such decisions are properly documented.

§ 24-13.301 Providing property.

§ 24-13.301-1 Special and general purpose property.

Generally, only special purpose property (i.e., equipment and facilities items whose usefulness, without need for substantial modification, is limited to a particular operation or project) may be provided to a contractor. Standard or general purpose items of administrative equipment (e.g., office furniture and equipment, cafeteria equipment, lockers, shelving, etc.), and technical equipment (e.g., laboratory furniture and fixtures, microscopes, oscilloscopes, guages, etc.), shall be provided only when justified under the most exceptional circumstances. Items of property having a unit cost of less than $1,000 shall not be provided contractors except as authorized under contracts with:

(a) Nonprofit institutions of higher education or other nonprofit organizations whose primary purpose is the conduct of scientific research;

(b) State and local Government agencies; or

(c) Contractors operating a Government-owned plant or performing on-site at Government installations.

§ 24-13.301-2 Providing property when disposal is limited.

Whenever nonseverable property is to be provided, the following will be applicable:

(a) *Nonseverable property.* Nonseverable property, other than foundations and similar improvements necessary for the installation of equipment, shall not be installed or constructed on land not owned by the Government in such fashion as to be nonseverable, unless approved by the Head of the Procuring Activity. The determination to locate such nonseverable property on land not owned by the Government shall be made only when all of the conditions in paragraph (a) (1) through (4) of this section have been met:

(1) Consideration has been given to any nonrecoverable costs involved, including transportation and installation.

(2) Consideration has been given to (i) locating the Government property where it can be segregated from existing contractor-owned and Government-owned property and where it is readily accessible from public thoroughfares and (ii) obtaining a written agreement by the contractor on whose land the property is to be placed that either the Government or another Government contractor will have a right to use and operate the property upon termination or completion of the work for which it was provided. (In cases where such an agreement is not obtained, the negotiation effort shall be documented accordingly.)

(3) The contractor agrees that the Government (i) will have the right to abandon in place all nonseverable Government property provided and (ii) will not have any obligation to disassemble or remove the property or to restore or rehabilitate the premises on which the property is located, unless otherwise provided in the contract and approved by the Head of the Procuring Activity.

(4) One of the circumstances in paragraphs (a)(4) (i) through (v) of this section has been met—

(i) The Government obtains an option to acquire the underlying land;

(ii) The property is disposable, after the Government's need therefore has ceased, to parties other than the contractor and the Government acquires from the owner a right to retain title and to dispose of all facilities it has constructed, without regard to the laws of real property in the jurisdiction in which the facility is located. Such right of disposition must be unencumbered, and will be evidenced by written agreement or other legal instrument signed by the contractor or other owner of the real property;

(iii) The contractor agrees in writing that he will purchase the property upon the termination or completion of the contract under which the property is provided, or within a specified reasonable time thereafter, at a price to be determined by appraisal, or at a price equal to the acquisition cost of the property less depreciation at the rate or rates specified in the contract (which rate or rates shall take into account the estimated useful life of the property) or for the scrap and salvage value of the property if it is determined that the estimated useful life of the property will not extend beyond the completion of the work for which the property was provided. Any such purchase agreement must permit the Government to credit any amounts due the contractor under the contract against the purchase price; or

(iv) The Head of the Procuring Activity specifically approves other provisions which he considers adequate to protect the interests of the Government in regard to the property.

(b) *Property subject to patent or other proprietary rights.* If patent or other proprietary rights of a contractor may restrict the disposal of Government property, the condition in either paragraph (a)(4) (ii) or (iii) of this section shall be satisfied before such property is provided.

§ 24-13.301-3 Changing Government property to be provided.

Increases in the amount of Government property specified in a contract shall be made under the contract "Changes" clause by issuance of an appropriate Change Order or Supplemental Agreement. Such increases shall be made only when approved in accordance with the policies pre-

scribed in this Subpart 24-13.3 and when the Government receives adequate consideration therefor. Unilateral decreases in or substitutions for the Government property specified in a contract to be provided by the Government may be ordered by the Contracting Officer.

Subpart 24-13.4—Use and charges

§ 24-13.400 Scope of subpart.

This subpart deals with the authority for a contractor or subcontractor to use Government property and the method for determining the charge, if any, for such use.

§ 24-13.401 General.

Authority for a contractor to use Government property must be granted by the Contracting Officer responsible for the contract under which the property is accountable and the contract file must be documented accordingly. If use without charge is granted, the contract file must be documented with a description of the consideration to the Government for such "no-charge" use.

§ 24-13.402 Use without charge.

(a) A contractor may use Government property without charge in the concurrent performance of contracts for more than one Government agency.

(b) A prime contractor may authorize subcontractors to use Government property which is in the possession of a subcontractor on a no-charge basis, when the price or fee of the prime contract is negotiated with the specific understanding that the use of property by subcontractors on a no-charge basis will be permitted in the performance of specific subcontracts with specific subcontractors.

§ 24-13.403 Charges.

The following charges shall be made or used as an evaluation factor:

(a) For land and land preparation, buildings, building installations, and land installations, a fair and reasonable rental based on sound commercial practice.

(b) For personal property (equipment and facilities) not covered in (a) of this section not less than the prevailing commercial rate for like property.

(c) For concurrent commercial usage of property an amount equal to at least 10% of the fair market value of such usage.

Subpart 24-13.5—Competition

§ 24-13.500 Scope of subpart.

This subpart sets forth guidance designed to preclude one prospective contractor from receiving an unfair competitive advantage over others when Government property is provided.

§ 24-13.501 General.

It is incumbent upon the Contracting Officer to insure that genuine competition prevails and that adequate consideration flows to the Government whenever and however Government property is to be provided a contractor for contract performance. It is also incumbent upon the Contracting Officer to insure that no unfair advantage inures to a contractor in possession of Government property.

§ 24-13.502 Solicitation documents.

Contracting Officers shall make certain that solicitation documents:

(a) Require each prospective contractor to state whether the use of Government property, additional facilities and equipment which must be acquired for contract performance, the estimated cost of individual items, and whether acquisition of such property will be financed by the prospective contractor or whether the Government will be requested to provide the required items.

(b) Explain whether it is the Government's intention to provide property, when it is known prior to solicitation that contract performance will require additional facilities or equipment.

(c) Require prospective contractors to:

(1) List items (including dollar value) of Government-owned property

in their possession which they propose to use in performance of the prospective contract;

(2) Identify the contract or other instrument under which the property is accountable; and

(3) Present written permission to use such property in the performance of the prospective HUD contract from the Government Contracting Officer having cognizance of the property.

(d) Include a statement that the user will assume all costs related to making the property available for use (e.g., transportation, installation, rehabilitation, modification, etc.), unless the Government is to assume such costs.

(e) Include a statement which explains the consideration to be given Government property during evaluation of bids and proposals. This is to insure that all prospective bidders and offerors understand that Government property will be an important consideration in evaluating their bids and proposals.

§ 24-13.503 Evaluation of bids and proposals.

The following policy shall be considered during evaluation of bids and proposals:

(a) In a competitive procurement, a prospective contractor provided Government property or authorized to use Government-owned property in his possession receives some degree of competitive advantage. When the degree of competitive advantage is so substantial as to be viewed as unfair by the Contracting officer, then the Contracting Officer shall utilize an equitable equalizing factor, such as increasing the bid price by an evaluation factor equivalent to:

(1) The cost to be reimbursed by the Government for property acquired at Government expense.

(2) The current dollar value (cost less depreciation) of Government-furnished property.

PART 24-16—PROCUREMENT FORMS

Subpart 24-16.2—Forms for Negotiated Supply Contracts

Sec.

24-16.201 Form for fixed price contracts.
24-16.201-1 Fixed price supply contracts—general provisions.
24-16.201-2 Fixed price contracts—general provisions (other than supply).

Subpart 24-16.3—Purchase and Delivery Order Forms

24-16.350 Form for purchase orders.

Subpart 24-16.8—Miscellaneous Forms

24-16.807 Cost-reimbursement forms—general provisions.
24-16.808 Additional general provisions—small business subcontracting.
24-16.853 Contractor's request for progress payment.
24-16.854 Reports of inventions.

AUTHORITY: Sec. 7(d), Housing and Urban Development Act (42 U.S.C. 3535(d)).

SOURCE: 41 FR 55816, Dec. 22, 1976, unless otherwise noted.

Subpart 24-16.2—Forms for Negotiated Supply Contracts

§ 24-16.201 Forms for fixed price contracts.

§ 24-16.201-1 Fixed price supply contracts—general provisions.

Standard Form 32 and HUD Form 752 shall be used for all fixed price supply contracts in excess of $10,000. In lieu of HUD Form 752, another appropriate form designed for this specific prupose and approved through the Departmental clearance procedures may be utilized.

§ 24-16.201-2 Fixed price contracts—general provisions (other than supply).

HUD form 736 shall be used for all fixed price contracts over $10,000 other than supply, construction or property management contracts. In lieu of HUD-736, another appropriate form designed for this specific prupose and approved through the Departmental clearance procedures may be utilized.

Subpart 24-16.3—Purchase and Delivery Order Forms

§ 24-16.350 Form for purchase orders.

All HUD purchase orders shall be executed on HUD Form 35 or on any other appropriate form designed for this specific purpose and approved through the Departmental clearance procedures.

Subpart 24-16.8—Miscellaneous Forms

§ 24-16.807 Cost-reimbursement forms—general provisions.

HUD Form 747 shall be used for all cost-reimbursement contracts over $10,000.

§ 24-16.808 Additional general provisions—small business subcontracting.

HUD Form 751 shall be used for all contracts over $500,000.

§ 24-16.853 Contractor's request for progress payment.

HUD Form 771, entitled "Contractor's Request for Progress Payment" shall be used as prescribed in HUDPR 24-30.519.

§ 24-16.854 Reports of inventions.

Contractors shall provide interim and final reports pursuant to the Patents clause on HUD Form 770.

PART 24-30—CONTRACT FINANCING

Subpart 24-30.1—Forms of Financing

Sec.
24-30.103 Advance payments—authority.
24-30.104-1 Letters of credit.

Subpart 24-30.4—Advance Payments

24-30.406 Responsibility—Delegation authority.
24-30.410 Findings, determinations and authorizations.
24-30.414-2 Contract provision for advance payments.

Subpart 24-30.5—Progress Payments Based On Cost

24-30.519 Contractor's request.

AUTHORITY: Sec. 7(d), Housing and Urban Development Act, (42 U.S.C. 3535(d)).

SOURCE: 41 FR 55817, Dec. 22, 1976, unless otherwise noted.

Subpart 24-30.1—Forms of Financing

§ 24-30.103 Advance payments—authority.

This section sets forth policy relating to advance payments:

(a) In considering whether cash advances are appropriate in a particular situation, and to determine the requirements for implementing advances, the Contracting Officer shall be guided by this section, the 41 CFR Subparts 1-30.1 and 1-30.4, Department of the Treasury Circular 1075 and part VI of the Department of the Treasury Fiscal Requirements Manual.

(b) Cash advances by HUD shall be limited to the minimum amounts needed by the contractor for the performance of the contract. The advance shall be timed in accord with the contractor's actual cash requirements.

(c) Department of the Treasury Circular 1075 (revised April 6, 1969) authorizes two methods for making cash advances: the letter of credit and the Treasury check. Normally, the method to be used will be chosen as follows:

(1) If HUD does not expect to have a continuing relationship with the contractor for at least one (1) year, advances will be made by Treasury check.

(2) If HUD expects to have a continuing relationship with the contractor for at least one (1) year involving total annual advances of less than $250,000, advances will be made by Treasury check.

(3) If HUD expects to have a continuing relationship with the contractor for at least one (1) year involving total annual advances of $250,000 or more and disbursements will not be made on a reimbursable basis, advances will be made by use of a letter of credit.

§ 24-30.104-1 Letters of credit.

No letter of credit will be issued unless the statutory requirements specified in 41 CFR 1-30.405 are fulfilled. If the Contracting Officer determines that advance payment by letter of credit is appropriate, he shall

insert the clause provided in HUDPR 24-7.5007.

Subpart 24-30.4—Advance Payments

§ 24-30.406 Responsibility—Delegation authority.

The determinations and findings required by 41 CFR 1-30.405 shall be made by the Head of the Procuring Activity only in those instances where specific delegation of authority has been issued in writing giving the HPA such authority to approve advances.

§ 24-30.410 Findings, determinations and authorizations.

Section 305 of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C 255), should be cited in the determinations and findings as authority for making advance payments.

§ 24-30.414-2 Contract provision for advance payments.

When the Contracting Officer determines that advance payments are appropriate, he shall insert the clause provided in 41 CFR 1-30.414-2.

Subpart 24-30.5—Progress Payments Based on Cost

§ 24-30.519 Contractor's request.

Each contract containing a Progress Payments clause shall provide that all invoices for progress payments be supported by HUD Form 771 entitled "Contractor's Request for Progress Payments," with any other information that may be reasonably required.

PART 24-50—CONTRACT ADMINISTRATION

Sec.

24-50.000 Scope of part.

Subpart 24-50.1—Processing Payments Under Cost-Reimbursement Contracts

24-50.100 Scope of subpart.
24-50.101 Definitions.
24-50.102 Submission of vouchers.
24-50.103 Processing vouchers.

Subpart 24-50.2—Processing Payment Under Fixed-Price Contracts

24-50.200 Scope of subpart.
24-50.201 Definitions.
24-50.202 Submission of invoices.
24-50.203 Processing invoices.

Subpart 24-50.3—Closing Completed Contracts and Research Grants

24-50.300 Scope of subpart.
24-50.301 General.
24-50.302 Definition—completed contract or grant.
24-50.303 Retention of contract and grant files.

Subpart 24-50.4—Administration of Government Property While Under Government Contract

24-50.400 Scope of subpart.
24-50.401 General.
24-50.402 Property administration.

Subpart 24-50.5—Guaranty and Subordination Agreement

24-50.500 Scope of subpart.
24-50.501 Policy.
24-50.502 Definitions.
24-50.503 Processing.
24-50.504 Guaranty agreement.
24-50.505 Subordination agreement

AUTHORITY: Sec. 7(d), Housing and Urban Development Act (42 U.S.C. 3535(d)).

SOURCE: 41 FR 55817, Dec. 22, 1976, unless otherwise noted.

§ 24-50.000 Scope of part.

This part sets forth policies concerning management and administration of contracts.

Subpart 24-50.1—Processing Payments Under Cost-Reimbursement Contracts

§ 24-50.100 Scope of subpart.

This subpart prescribes policy pertaining to the processing of vouchers under cost-reimbursement type contracts.

§ 24-50.101 Definitions.

As used in this subpart, the following terms have the meaning as stated:

(a) "Cost-reimbursement type contracts" includes cost-plus-a-fixed-fee,

cost-plus-an-incentive-fee, cost-sharing, labor hour, and time and material contracts.

(b) "Voucher" is used to identify claims by the contractor for reimbursement of costs incurred or for fee earned and relate to either interim request or final cost or fee remaining under the contract.

§ 24-50.102 Submission of vouchers.

Submission of vouchers shall be in accordance with the following:

(a) Interim vouchers shall be submitted directly to the HUD Official and at the location stipulated in the contract for approval and payment processing. The frequency for submission will be specified in the contract. In the absence of a contract provision to the contrary, the contractor may submit a voucher once each month. The Contracting Officer will request the contractor to consolidate vouchers under one contract as much as possible to reduce the number of vouchers. Vouchers shall not contain claims pertaining to more than one contract.

(b) The Contracting Officer shall require the contractor to provide, as a part of each voucher submission, an analysis of the total vouchered charges. Where data is readily available from the contractor's records, a limited analysis may be placed on the face of Public Voucher for Purchases and Services Other Than Personal (Standard Form 1034), provided the reliability of the contractor has otherwise been established. As a minimum, the analysis shall include cumulative and current costs broken down by cost elements. When a more detailed analysis is required, the Continuation Sheet (Standard Form 1035) or an attachment may be used.

(c) Contractors shall be required to submit separate invoices for fee and, where the amount of fee claimed depends on a computation based on physical progress or rate of delivery of the completed item, the Contracting Officer shall require the contractor to show the basis for computing the fee installment on the voucher (face or reverse of Standard Form 1034) or on an attachment.

§ 24-50.103 Processing vouchers.

Processing vouchers shall be in accordance with the following:

(a) Prior to approving vouchers for payment, the Contracting Officer may, as appropriate, verify the status of the contract by consulting with other Government personnel (i.e., technical, audit, and financial personnel) concerned with administration of the contract.

(b) *Provisional vouchers.* (1) The eligibility for reimbursement of claims submitted by a contractor for costs or payment of fee shall be determined pursuant to the terms of the contract. Authority for payment must be established before any reimbursements under the contract are approved. In no event will a reimbursement claim be processed by the Contracting Officer for payment which would result in cumulative payment in excess of the maximum amount payable as limited by the contract.

(2) The contractor shall submit reimbursement vouchers under cost-type contracts directly to the HUD official and at the location stipulated in the contract for approval prior to payment. All vouchers, with the exception of the final voucher, shall be marked "Approved for provisional payment in the amount of $—— subject to audit prior to final payment," signed by the appropriate HUD official, and processed for payment. Questionable costs, determined through periodic audit, lack of adequate documentation, or otherwise, shall be suspended or disapproved prior to approval of the voucher. In those situations where (i) there is reason to question the reliability or accuracy of the contractor's claim, (ii) there is an indication of cost overrun, or (iii) the submission is the contractor's initial claim, the recommendations of the cognizant auditor should be requested prior to approval.

(3) If the contractor has not deducted from his claims amounts required to be withheld pursuant to the provisions of the contract. The Contracting Officer shall make the deduction. Such deductions shall be treated as suspensions. Amounts deducted may be resubmitted by the contractor at such time as the contractor has evi-

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denced compliance with the requirements necessary to permit payment and may, in any event, be claimed on the final voucher.

(4) Vouchers which have not been properly prepared by the contractor shall be returned for revision. No erasures are permitted on a voucher or a continuation sheet. A voucher and/or continuation sheet or its equivalent, which requires alteration, may be changed by striking out the incorrect item and inserting the correct item. An alteration made by the contractor must be initialed by the contractor. An alteration made by the Contracting Officer must be initialed by the Contracting Officer and may be made only in accordance with 36 Comp. Gen. 769 (1957) which provides that when errors in computations or extensions are detected, where the payee has clearly made claim for the full quantity of materials or services and at the proper unit price, the claim may be altered upward or downward prior to approval provided the adjustment does not exceed $10.

Vouchers may be adjusted by the Contracting Officer, provided that costs have not been suspended or disapproved and the errors are not too numerous to correct. The incorrect computation or extension may be altered by drawing a line through the incorrect amount and inserting the corrected amount on the original and all copies of the voucher. Each alteration must be initialed. The amount of the error will be deducted from or added to the total of the voucher. If Standard Form 1034 is used, the amount of the error will also be deducted from or added to the total by use of the "Difference" block on Standard Form 1034. Contractors will be notified, in writing of mathematical errors which overstate the total amount claimed in excess of $10. If an underclaim is in excess of $10, the actual amount claimed, if otherwise proper, may be processed for payment. Contractors should be notified of any errors detected or of any adjustments made according to this policy.

(c) *Final Voucher.* Upon receipt of a final voucher for contracts in excess of $50,000, the Contracting Officer shall furnish a copy to the cognizant auditor for final audit prior to payment. The final voucher shall be supported by contractor's (or assignee's) release and assignment forms, and the final schedule of cumulative cost under the contract. Final vouchers shall not be approved until the results of the final audit have been received by the Contracting Officer and all deliverable products have been received and accepted by the Government.

Subpart 24-50.2—Processing Payment Under Fixed-Price Contracts

§ 24-50.200 Scope of subpart.

This subpart prescribes policy pertaining to the processing of invoices under fixed-price type contracts.

§ 24-50.201 Definitions.

As used in this subpart, the following terms have the meaning as stated:

(a) "Fixed-price type contracts" include firm fixed-price, fixed-price with escalation, fixed-price incentive, indefinite delivery and small purchases.

(b) "Invoice" is used to request payment under an established payment schedule specifically identified in the contract.

§ 24-50.202 Submission of invoices.

Invoices shall be submitted to the HUD Official and at the location stipulated in the contract for approval and payment processing.

§ 24-50.203 Processing invoices.

The processing of invoices shall be accomplished in accordance with the following:

(a) Prior to approving invoices for payment, the appropriate HUD official may, as appropriate, verify the status of the contract by consulting with cognizant Government personnel (i.e., technical, audit and financial personnel) concerned with administration of the contract.

(b) Withholdings pursuant to the contract will be handled in accordance with HUDPR 24-50.103(b)(3).

(c) Invoices which have not been properly prepared by the contractor shall be returned for revision. No erasures are permitted on an invoice or a continuation sheet. However, alter-

ations may be made by a contractor by striking out the incorrect item and writing in the correct item. Any alteration made by the contractor must be initialed by the contractor.

(d) *Final invoice.* The final invoice shall be supported by contractor's release and assignment forms, as appropriate. Final invoice shall not be approved until final acceptance of the contractor's performance is received by the Contracting Officer or his duly authorized representative.

Subpart 24-50.3—Closing Completed Contracts and Research Grants

§ 24-50.300 Scope of subpart.

This subpart establishes policy governing the closing of completed contracts and is applicable to all contracts and research grants.

§ 24-50.301 General.

The procedures for closing completed contracts are a primary tool of contract management and contract administration. Each procuring activity shall establish adequate procedure to insure proper closing of files and conduct contract/grant closing reviews in order that the file is completely documented. The comprehensive closing review serves the following purposes:

(a) Facilitates orderly segregation and disposition of records, and ensures efficient use of filing equipment and space;

(b) Identifies all uncompleted actions;

(c) Ensures that all contractual obligations have been fulfilled, that the interests of the Government have been protected; and, that sound business practices have been followed.

§ 24-50.302 Definition—completed contract or grant.

A completed contract or grant is one which is both physically and administratively complete and in which all aspects of performance by the contractor have been either accomplished or formally waived. A contract is physically complete only after articles and services called for under the contract have been delivered to and formally accepted by the Government. A contract is administratively complete when all administrative actions are accomplished and all payments made.

§ 24-50.303 Retention of contract and grant files.

Each procuring activity shall ensure that contract and grant files are properly forwarded to the appropriate Federal Records Center for retention of a minimum of six (6) years from the date of closing completed files. In connection with contracts where 41 CFR Part 1-3 requires a finding and determinations, these files shall be maintained in accordance with 41 CFR 1-3.308.

The procuring activity shall maintain a listing of all contracts and grants closed and forwarded to the retention center.

Subpart 24-50.4—Administration of Government Property While Under Government Contract

§ 24-50.400 Scope of subpart.

This subpart sets forth policy and procedures governing administration of Government-furnished property and property acquired by contractors at Government expense for performance of HUD contracts.

§ 24-50.401 General.

Responsibility within HUD for administering Government property rests with the Contracting Officer.

§ 24-50.402 Property administration.

The duties of the responsible officer are identified below:

(a) The Contracting Officer is the HUD "Accountable Officer" for Government property and maintains the official records of such property.

(b) The Contracting Officer performs all transactions and handles all matters concerning Government property, including use charges as prescribed in HUDPR 24-13.4, determinations of liability for lost, damage, or destroyed Government property, and resolving disputes with contractors with regard to property.

(c) The Contracting Officer will review and determine the adequacy of contractor's property policy and proce-

dures concerning: (1) Receiving and inspection; (2) accounting, control, and reports; (3) utilization, including reporting excess property; (4) maintenance; i.e., protection, preservation, service, repair, warranties and guaranties, etc.; (5) scrap and salvage of material, parts, etc.; and (6) disposal, including preparation for shipment and shipping procedures.

Subpart 24-50.5—Guaranty and Subordination Agreements

§ 24-50.500 Scope of subpart.

This subpart sets forth policy and procedures for processing guaranty and subordination agreements.

§ 24-50.501 Policy.

Guaranty and subordination agreements may be used when it is determined as the result of a pre-award survey that the financial condition of a proposed contractor warrants such protection for the Government or when, during the course of the work, the Government determines that such protection is necessary to its interest.

§ 24-50.502 Definitions.

As used in this subpart, the following terms have the meaning as stated:

(a) *Guaranty agreement.* An agreement wherein the guarantor guarantees the performance of a bidder (contractor).

(b) *Subordination agreement.* An agreement wherein a creditor agrees to subordinate debts due it from the bidder (contractor) to the rights of Government.

§ 24-50.503 Processing.

The requirements for processing a guaranty or subordination agreement are stated below:

(a) When, in the judgment of the Contracting Officer, the financial condition of the prospective contractor warrants, he shall obtain a guaranty or subordination agreement, as appropriate. Formats for guaranty and subordination agreements are provided in HUDPR 24-50.504 and 24-50.505, respectively. The Contracting Officer shall obtain the review of the Office of General Counsel before executing an agreement in any other format.

(b) All corporate guarantors will be required to obtain a statement from the corporate counsel indicating whether the corporate guarantor has the authority under the laws of the State in which the company is incorporated and pursuant to its charter, to enter into such an agreement. This statement will be attached to the agreement, in addition to the current financial statement

(c) If a contract results from the proposal, the Contracting Officer shall acknowledge receipt of the agreement provided for under the form illustrated in HUDPR 24-50.504 and 24-50.505. If no contract award results from the proposal, all copies of the agreement shall be destroyed.

§ 24-50.504 Guaranty agreement.

Whenever a Guaranty Agreement is required as set forth in HUDPR 24-50.5, it shall be developed substantially as shown below:

GUARANTY AGREEMENT FOR CORPORATE GUARANTOR

(Applicable to one Government Contract)

———————— (Insert Offeror's Name), a corporation organized under the laws of the State of ——, having its principal place of business at —— in the City and State of ——, hereinafter called the Offeror is under consideration by the United States of America (————) (Insert Department) hereinafter called the Government, for the award of a certain contract, —— (IFB, RFP or RFQ) hereinafter referred to as such contract. Such contract will call for the furnishing of approximately for the contract price of approximately $——. The Government is willing to award ———————— (Insert Quantity and General Description of Supplies or Services to be Procured) for the contract price of approximately ———————— such contract to ———————— (Insert Offeror's Name) only upon condition that ————————, (Insert Guarantor's Name, Description and Address) for itself, its successors and assigns, hereinafter referred to as the Guarantor, will, in the event such contract is awarded by the Government to the Offeror, guarantee absolutely to the Government the full, complete and faithful performance of the Offeror of such contract according to the terms and condi-

tions thereof and at the time and in the manner provided therein.

In consideration of the award of such contract to the the Offeror the undersigned Guarantor agrees as follows:

1. Guaranty. The Guarantor absolutely guarantees the full, complete and faithful performance by the Offeror of such contract, as such contract may be from time to time amended as authorized by its terms, according to the terms and conditions of such contract as so amended, and at the time and in the manner provided therein. The Guarantor agrees to provide the Offeror all necessary and required resources including financing, which are necessary to assure the full, complete and satisfactory performance of such contract.

2. Extension of Time of Performance. Any extention of the time of performance of such contract as so amended shall not release the undesigned Guarantor from liability hereon.

3. Assignment. This instrument shall bind the undersigned Guarantor, its successor and assigns. If any person, firm, corporation or entity other than ———— (Insert Offeror's Name) becomes obligated to perform the contract or any part thereof, whether by operation or law or otherwise, any and all rights of the Government against the Guarantor shall remain in full force.

4. Default. In the event of termination for default under the terms of such contract, or in the event of failure, insolvency, default, bankruptcy, arrangement, appointment of receiver for ———— (Insert Offeror's Name) or other liquidation of the Offeror, the Guaranty herein shall become absolute.

5. Waiver of Notice. The Guarantor waives notice of default on the part of the Offeror and agrees that its Guaranty shall become absolute without necessity for the giving of such notice.

6. Continuation of Guaranty. The Guaranty herein shall continue until full, complete and faithful performance of such contract as it may be from time to time amended as authorized by its terms.

7. Default Liability. In addition to all other guarantees contained in this agreement, in the event that the Government terminates such contract for default and awards the uncompleted portion of such contract to another source at a fair and reasonable price, the Guarantor shall be liable for any excess costs incurred by the Government as a result of such reprocurement and for the repayment of any unrecoupled Partial Payments, Progress Payments or Advanced Payments paid to the Offeror by the Government. In addition, the Guarantor shall be liable for all costs and expenses paid or incurred by the Government in enforcing this Guaranty. The Contracting Officer representing the Government in connection with such contract shall determine the total costs and expenses, if any, incurred by the Government.

8. Enforcement. This Guaranty Agreement shall inure to the benefit of and may be enforced by the Government.

9. Construction. Nothing in this Guaranty Agreement shall be construed to obligate the Government to award any contract to ———— (Insert Offeror's Name)

Executed the —— day of —— 197 —.

Two Witnesses:

————————————————

(Guarantor)

———————— By ————————

————————————

(Title)

————————————

(Business Address)

I, ————, certify that I am the ———— Secretary of the Corporation named as Guarantor herein; that ———— who signed this Agreement on behalf of the Guarantor, was then ———— of said Corporation; that said Agreement was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

———————— Corporate Seal

(Secretary)

Receipt of a copy of the above Guaranty Agreement is acknowledged.

Contracting Officer Address:

THE UNITED STATES OF AMERICA

———————— By ————————

————————————

(Contracting Officer)

§ 24-50.505 Subordination agreement.

Whenever a Subordination Agreement is required as set forth in HUDPR 24-50.5, it shall be developed substantially as shown below:

SUBORDINATION AGREEMENT

(Applicable to One Government Contract)

———————— (Insert Debtor's Name), a corporation *organized under the laws of ——, having its principal place of business at —— in the City and State of ——, a partnership *doing business as —— at —— County of —— City of —— State of —— an individual, *having its principal place of business at —— in the City and State of ——, hereinafter called the

* Strike out inapplicable language.

Debtor, is under consideration by the United States of America (————) (Insert Department) hereinafter called the Government, for the award of a certain contract. Such contract will call for the furnishing of approximately ———————— (Insert Quantity and General Description of Items or Services to be Procured) for the contract price of approximately ——— dollars ($——). The Government is willing to award such contract to the Debtor only upon condition that ———————— (Insert Creditor's Name, Description, Address, etc.), hereinafter referred to as the Creditor, will agree to subordinate any and all present and future rights with respect to payments due or to become due from the Debtor to the undersigned Creditor to the rights of the Government under or arising out of the contract. As of the date of execution of this agreement recited at the end thereof, ———— (Insert the Amount) is owing or is due and owing from the Debtor to the Creditor.

In consideration of the award of the contract to the Debtor the undersigned agrees as follows:

1. Payments and Debts. Any and all present and future rights of the undersigned Creditor with respect to payments due or to become due by reason of the above cited indebtedness and including any additional future indebtedness incurred as advances by the Creditor for working capital purposes and/or acquisition of capital assets owed by the Debtor to the Creditor, are fully subordinated to the rights of the Government under or arising out of the contract. The undersigned Creditor will make no demand for payment from the Debtor and will forbear to sue on said indebtedness, or to attempt to collect the same by legal process until the contract is fully performed. (Purchases of raw materials, fabricated subassemblies, component parts and/or subcontractor services supplied by the Creditor to the Debtor under usual trade terms in the normal course of the Creditor's business will not be construed as being advances for working capital purposes.)

2. Property of the Debtor. Any and all present and future rights of the undersigned Creditor against the Debtor or any property of the Debtor are fully subordinated to the prior performance of the contract and the liquidation of all obligations of the Debtor under or arising out of the contract.

3. Collateral. So long as the rights of the Government under or arising out of the contract remain unsatisfied, any and all sums obtained by the Creditor from the Debtor or from any property of the Debtor received by the Creditor whether or not incident to any assignment, mortgate, pledge or other hypothecation of property of the Debtor shall be held for the use and benefit of the Government, and no such sums or property shall belong to or be retained by the Creditor.

4. Assignment of Contract. If any person, firm, corporation or entity other than the Debtor becomes obligated to perform the contract or any part thereof, whether by operation by law or otherwise, any and all present and future rights of the Creditor shall remain fully subordinated to the rights of the Government.

5. Default. In the event of failure, insolvency, default, bankruptcy, arrangement, appointment of receiver for the Debtor or other liquidation of the Debtor, any claim due from the Debtor, its successors and assigns, to the undersigned Creditor shall be subordinated to any claim of the Government against the Debtor under or arising out of the contract; and in such event the undersigned Creditor hereby assigns to the Government (and this agreement shall constitute the assignment to it) all claims of any kind or sort the Creditor may now or hereafter have against the Debtor and all dividends and other distributions which the Creditor may receive or to which it may be entitled by reason of any claim filed, claimed or asserted against the Debtor. The undersigned Creditor consents to and waives notice of all extensions or renewals of said indebtedness, release of security and any arrangements that may be made in the event control of the business of the Debtor is assumed by a court or by creditors. The undersigned Creditor irrevocably authorizes and empowers the Government to demand, sue for, collect and receive every such dividend or distribution and give acquittance and to file claims and take such other proceedings in the Government's own name or in the name of the undersigned Creditor or otherwise, as the Government may deem necessary or advisable for the enforcement of this agreement and the undersigned Creditor agrees to execute and deliver to the Government such powers of attorney, assignments or other instruments as may be requested by the Government in order to enable the Government to enforce any and all claims upon or with respect to any or all indebtedness of the Debtor to the undersigned Creditor, and to collect and receive any and all dividends or distributions which may be payable or deliverable at any time upon or with respect to any such indebtedness of the Debtor to the undersigned Creditor.

6. Modification. This Subordination Agreement shall not be affected by any action extending the time of performance of the contract or by the making of any amendment or modification authorized by the terms of the contract.

7. Certification. The Creditor hereby certifies that he has not given or executed any

prior Subordination Agreement with respect to its claims against the Debtor except as follows: ———— (Insert to Whom, or if None, so state).

8. Records. The Creditor hereby agrees to direct the Debtor(s) to mark its records in accordance with this Subordination Agreement and (b) to confirm receipt of notice by signing in the place indicated below. The Creditor also agrees to permit audits by the Government and to furnish reports to the Government at its request, to aid it in determining the Creditor's conformity with this agreement.

9. Enforcement. This agreement shall inure to the benefit of and may be enforced by the United States. It is recognized and agreed by the Creditor that any breach or failure to perform or comply with the terms of this Agreement will be considered as a performance default in the contract awarded the Debtor and the Government may proceed as provided for in these cases in such contract. In the event that the Government terminates the contract with the Debtor for such default and awards the uncompleted portion of such contract to another source at a fair and reasonable price, the Creditor shall be liable for any excess costs incurred by the Government as a result of such re-procurement. In addition, the Creditor shall be liable for all costs and expenses incurred by the Government in enforcing this provision. The rights and remedies of the Government provided herein shall not be exclusive and are in addition to the other rights and remedies provided by law.

10. Construction. Nothing in this Agreement shall be construed to obligate the Government to award any contract to the Debtor.

Executed the ——— day of ——— 196—
Two Witnesses:

————————————————
(Creditor)
———————— By ————————

————————————————
(Title)

————————————————
(Business Address)

I, ————, certify that I am the ———— Secretary of the Corporation named as Creditor herein; that ———— who signed this agreement on behalf of the Creditor, was then ———— of said Corporation; and said Agreement was duly signed for and in behalf of said Corporation by authority of its governing body, and is within the scope of its corporate powers.

————————Corporate Seal

Receipt of a copy of the above agreement is acknowledged. The Debtor agrees to comply with all terms and provisions of this agreement affecting it and to withhold payment or distribution to the subordinating Creditor and to the Debtor's stockholders, officers, and directors in conformity with this agreement. It is further agreed that its failure to carry out any of the terms of this agreement constitutes a default in performance of the contract awarded it and the Government may proceed in accordance with the terms of said contract making provisions for default.

———————— By ————————

————————————————
(Title)

Receipt of a copy of the above Subordination Agreement is acknowledged.

THE UNITED STATES
OF AMERICA

By ————————————————
(Contracting Officer)

Address: ————————————————

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CHAPTER 25—NATIONAL SCIENCE FOUNDATION

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PART 25–1—GENERAL

Subpart 25–1.1—National Science Foundation Procurement Regulations Systems

Sec.
25–1.101 Establishment of NSF Procurement Regulations.
25–1.102 Purpose.
25–1.103 Authority.
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25–1.105 Exclusions.
25–1.106 Issuance.
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25–1.106–3 Inquiries.
25–1.107 Arrangement.
25–1.108 Implementation and supplementation.
25–1.109 Deviation.
25–1.109–1 Description.
25–1.109–2 Procedure.

AUTHORITY: 42 U.S.C. 1861–1875, 1876–1879; 33 U.S.C. 1121–1124; 63 Stat. 37, as amended; 41 U.S.C. 201 note.

SOURCE: 34 FR 1439, Jan. 30, 1969, unless otherwise noted.

Subpart 25–1.1—National Science Foundation Procurement Regulations Systems

§ 25–1.101 Establishment of NSF Procurement Regulations.

The National Science Foundation Procurement Regulations (NSFPR) are hereby established.

§ 25–1.102 Purpose.

These regulations implement and supplement the Federal Procurement Regulations (FPR) and are a part of the Federal Procurement Regulations System.

§ 25–1.103 Authority.

The NSF Procurement Regulations are prescribed by the Director of the National Science Foundation, pursuant to the authority of the National Science Foundation Act of 1950, as amended, 42 U.S.C. 1861–1875, title IX of the National Defense Education Act of 1958, 42 U.S.C. 1876–1879, the National Sea Grant College and Program Act of 1966, 33 U.S.C. 1121–1124, and the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended.

§ 25–1.104 Applicability.

Except where a deviation is specifically authorized in accordance with § 25–1.109 or otherwise authorized by law, the FPR and the NSFPR govern NSF procurement of personal property and of nonpersonal services. To the extent other NSF regulations affecting procurement are not inconsistent with these regulations they will remain in effect until such time as they are rescinded, lapse or are incorporated in NSFPR.

§ 25–1.105 Exclusions.

A procurement policy or procedure which bears a security classification or is expected to be in effect for less than six months or which is instituted on an experimental basis will not be included in NSFPR. Detailed instructions to NSF employees are not included in the NSFPR.

§ 25–1.106 Issuance.

§ 25–1.106–2 Publication.

The NSFPR will be published in the daily issues of the FEDERAL REGISTER and, in cumulative form in the Code of Federal Regulations. Copies of NSFPR, as published in the FEDERAL REGISTER and the Code of Federal Regulations, may be purchased by the public from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

§ 25–1.106–3 Inquiries.

Inquiries regarding the NSFPR should be addressed to the Administrative Manager, National Science Foundation, Washington, D.C. 20550.

§ 25–1.107 Arrangement.

(a) The NSF Procurement Regulations employ the same numbering system and nomenclature used in the Federal Procurement Regulations and conform with FEDERAL REGISTER standards approved for the FPR.

(b) Where the NSFPR implements a part, subpart, section, or subsection of the FPR, the implementing part, subpart, section, or subsection of the NSFPR will be numbered and captioned to correspond to the FPR part, subpart, section, or subsection.

(c) Where the NSFPR supplements the FPR, the numbers 50 and up will be assigned to the parts, subparts, or sections involved.

(d) Where the subject matter contained in a part, subpart, section, or subsection of the FPR requires no implementation, the NSFPR will contain no corresponding part, subpart, section, or subsection number.

§ 25-1.108 Implementation and supplementation.

The NSF Procurement Regulations "implement" and "supplement" the FPR. The meaning of these terms includes the following:

(a) Implementation may have either of the following meanings:

(1) A part, subpart, section, etc., which treats a similarly numbered portion of the FPR in greater detail or indicates the manner of compliance, including any deviations.

(2) The absence of a corresponding part, subpart, section, etc., in the NSFPR indicates that the FPR is applicable as written. Policies and procedures in the FPR are not repeated in the NSFPR.

(b) Supplementation means NSFPR coverage of matters which have no counterpart in the FPR.

§ 25-1.109 Deviation.

§ 25-1.109-1 Description.

The term "deviation" includes any of the following actions:

(a) When a prescribed contract clause is set forth verbatim, use of a contract clause covering the same subject matter which varies from that set forth.

(b) When a standard or other form is prescribed, use of any other form for the same purpose.

(c) Alteration of a prescribed standard or other form, except as may be authorized in the regulations.

(d) The imposition of lesser or, where the regulation expressly prohibits, greater limitations than are imposed upon the use of a contract clause, form, procedure, type of contract, or upon any other procurement action, including but not limited to, the making or amendment of a contract, or actions taken in connection with the solicitation of bids or proposals, award, administrative, or settlement of contracts.

(e) When a policy or procedure is prescribed, use of any inconsistent policy or procedure.

§ 25-1.109-2 Procedure.

In the interest of establishing and maintaining uniformity to the greatest extent feasible, deviations from the FPR and NSFPR shall be kept to a minimum and controlled as follows:

(a) In individual cases, deviations from the FPR and NSFPR may be authorized by the Deputy Director. This authority may not be redelegated.

(1) A supporting statement for each individual deviation, which indicates briefly the nature of the deviation and the reasons for such special action shall be included in the contract file.

(b) In classes of cases, requests for deviations from the FPR and NSFPR shall be forwarded to the Deputy Director and shall be accompanied by an appropriate supporting statement.

(c) If a requested deviation is considered appropriate, approval will be accomplished as follows:

(1) Where the deviation applies to an individual case, approval will be granted by memorandum addressed to the Contracting Officer. The contract file shall include a copy of the request and approval.

(2) Where the deviation applies to a class of cases, when necessary, approval of the General Services Administration will be obtained.

(d) When any deviation in a standard form provision is authorized, physical change may not be made in the printed form but shall be made by appropriate provision in the schedule specifications or continuation sheet.

PART 25-9—PATENTS, DATA, AND COPYRIGHTS

Subpart 25-9.1—Patents

Sec.

25-9.100 Scope of subpart.
25-9.101 Definitions.
25-9.102 Source of authority.
25-9.103 Procedures for selection of contract clauses.
25-9.104 Greater rights determination.

Sec.
25-9.105 Minimum government rights.
25-9.106 Availability of inventions to the public.
25-9.107 Delegations.

AUTHORITY: Secs. 11(e) and 12(a) of the National Science Foundation Act, as amended (42 USC 1870(e) and 1871(a)).

SOURCE: 39 FR 41977, Dec. 4, 1974, unless otherwise noted.

Subpart 25-9.1—Patents

§ 25-9.100 Scope of subpart.

This subpart sets forth policies, procedures, and clauses with respect to rights in inventions made in the course of or under contracts subject to Title III of the Federal Property and Administrative Services Act of 1949, as amended, entered into by the National Science Foundation. Policies, procedures, and clauses with respect to rights in inventions under awards other than the above are set forth in 45 CFR Part 650.

§ 25-9.101 Definitions.

As used in this subpart—

(a) The term "contract" includes contracts entered into by the Foundation which are made for the purpose of conducting experimental, developmental, or research work or which contain a significant amount of such work.

(b) The term "Director" means the Director of the Foundation;

(c) The term "Foundation" means the National Science Foundation;

(d) The term "contractor" means the recipient of a contract, and may, as the contract requires, include subcontractors of a contractor at any tier;

(e) The term "invention" includes any art, method, process, machine, manufacture, design, or composition of matter, or any new and useful improvement thereof, or any variety of plant, which is or may be patentable under the Patent Laws of the United States of America or any foreign country;

(f) The term "to the point of practical application" means to manufacture in the case of a composition or product, to practice in the case of a process, or to operate in the case of a machine and under such conditions as to establish that the invention is being worked and that its benefits are reasonably accessible to the public;

(g) The term "President's Policy" means the President's Statement of Government Patent Policy issued August 23, 1971 (36 FR 16887, August 26, 1971); and

(h) The term "Patent Policy Review Committee" refers to a committee made up of Foundation personnel and established by the Director to administer certain aspects of Foundation patent policy.

§ 25-9.102 Source of authority.

(a) Section 12(a) of the National Science Foundation Act of 1950, as amended (42 U.S.C. 1871(a)), provides as follows:

> Each contract or other arrangement executed pursuant to this Act which relates to scientific research shall contain provisions governing the disposition of inventions produced thereunder in a manner calculated to protect the public interest and the equities of the individual or organization with which the contract or other arrangement is executed; Provided, however, That nothing in this Act shall be construed to authorize the Foundation to enter into any contractual or other arrangement inconsistent with any provisions of law affecting the issuance or use of patents.

(b) Section 11(e) of the same Act provides as follows:

> The Foundation shall have the authority, within the limits of available appropriations, to do all things necessary to carry out the provisions of this Act, including, but without being limited thereto, the authority • • •
>
> (e) to acquire by purchase, lease, loan, gift, or condemnation, and to hold and dispose of by grant, sale, lease, or loan, real and personal property of all kinds necessary for, or resulting from, the exercise of authority granted by this Act.

The President's Policy provides guidance as to basic policies to be followed by executive agencies with respect to inventions or discoveries made in the course of their awards. The provisions set forth in this subpart are intended to implement the National Science Foundation Act in accordance with the basic guidelines and philosophy of the President's Policy.

§ 25-9.103 **Procedures for selection of contract clauses.**

(a) Except as provided in paragraphs (b) and (c) of this section, all Foundation contracts shall contain the following clause:

PATENT RIGHTS—OPTION IN THE GOVERNMENT

(a) *Definitions.*

(1) "Subject Invention" means any invention or discovery of the Contractor conceived or first actually reduced to practice in the course of or under this contract, and includes any art, method, process, machine, manufacture, design, or composition of matter, or any new and useful improvement thereof, or any variety of plant, which is or may be patentable under the Patent Laws of the United States of America, or any foreign country.

(2) "Contract" means any contract, agreement, grant, or other arrangement, or subcontract entered into with or for the benefit of the Government where a purpose of the contract is the conduct of experimental, developmental, or research work.

(3) "States and domestic municipal governments" means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, and any political subdivision and agencies thereof.

(4) "Government agency" includes an executive department, independent commission, board, office, agency, administration, authority, Government corporation, or other Government establishment of the executive branch of the Government of the United States of America.

(5) "To the point of practical application" means to manufacture in the case of a composition or product, to practice in the case of a process, or to operate in the case of a machine and under such conditions as to establish that the invention is being worked and that its benefits are reasonably accessible to the public.

(6) "Foundation" means the National Science Foundation.

(b) *Disposition of principal rights*—(1) *Assignment to the Government.* The Contractor agrees to assign to the Government when requested, the entire right, title, and interest throughout the world in and to each Subject Invention, except to the extent that rights are retained by the Contractor under paragraphs (b)(2) and (d) of this clause.

(2) *Greater Rights Determinations.* The Contractor, or the employee-inventor with authorization of the Contractor, may retain greater rights than the nonexclusive license provided in paragraph (a) of this clause in accordance with the procedure and criteria of 41 CFR 25-9.104. A request for a determination as to whether the Contractor or the employee-inventor is entitled to retain such greater rights must be submitted to the Foundation at the time of the first disclosure of the invention pursuant to paragraph (e)(2)(i) of this clause, or not later than 3 months thereafter or such longer period as may be authorized by the Foundation for good cause shown in writing by the Contractor. The information to be submitted for a greater rights determination is specified in 41 CFR 25-9.104. Each determination of greater rights under this contract normally shall be subject to paragraph (c) of this clause and to such reservations and conditions as may be deemed to be appropriate by the Foundation.

(c) *Minimum rights granted to the Government.* With respect to each Subject Invention to which the Contractor retains principal or exclusive rights, the Contractor:

(1) Hereby grants to the Government a nonexclusive, nontransferable, paid-up license to make, use, and sell each Subject Invention throughout the world by or on behalf of the Government of the United States (including any Government agency), States and domestic municipal governments, unless the Director of the Foundation determines after the invention has been identified that it would not be in the public interest to acquire the license for States and domestic municipal governments;

(2) Agrees to grant, upon request of the Government, a license on terms that are reasonable under the circumstances to responsible applicants;

(i) Unless the Contractor, his licensee, or his assignee demonstrates to the Government that effective steps have been taken within 3 years after a patent issued on such invention to bring the invention to the point of practical application or that the invention has been made available for licensing royalty-free or on terms that are reasonable in the circumstances, or can show cause why the principal or exclusive rights should be retained for a further period of time; or

(ii) To the extent that the invention is required for public use by governmental regulations or as may be necessary to fulfill public health or safety needs, or for other public purposes stipulated in this contract;

(3) Shall submit written reports at reasonable intervals, upon request of the Government, during the term of the patent on the Subject Invention regarding

(i) The commercial use that is being made or is intended to be made of such invention; and

(ii) The steps taken by the Contractor or his transferee to bring the invention to the point of practical application or to make the invention available for licensing;

(4) Agrees to refund any amounts received as royalty charges on any Subject Invention

in procurements for or on behalf of the Government and to provide for that refund in any instrument transferring rights to any party in the invention; and

(5) Agrees (i) to provide for the Government's paid-up license pursuant to paragraph (c)(1) of this clause in any instrument transferring rights in a Subject Invention and (ii) to provide for the granting of licenses as required by (c)(2) of this clause and for the reporting of utilization information as required by paragraph (c)(3) of this clause whenever the instrument transfers principal or executive rights in any Subject Invention.

(d) *Minimum rights to the Contractor.* (1) The Contractor reserves a revocable, nonexclusive, paid-up license in each patent application, filed in any country on a Subject Invention and any resulting patent in which the Government acquires title. The license shall extend to the Contractor's domestic subsidiaries and affiliates, if any, within the corporate structure of which the Contractor is a part and shall include the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license shall be transferable only with approval of the Foundation except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(2) The Contractor's nonexclusive domestic license retained pursuant to paragraph (d)(1) of this clause may be revoked or modified by the Foundation, either in whole or in part, as to the United States, its territories and possessions, Puerto Rico, and the District of Columbia to the extent necessary to achieve expeditious practical application of the Subject Invention under 41 CFR 101-4.103-3 pursuant to an application for exclusive license submitted in accordance with 41 CFR Parts 101-4-104-3. This license shall not be revoked in that field of use and or the geographical areas in which the Contractor has brought the invention to the point of practical application and continues to make the benefits of the invention reasonably accessible to the public. The Contractor's nonexclusive license in any foreign country reserved pursuant to paragraph (d)(1) of this clause may be revoked or modified, either in whole or in part, in the discretion of the Foundation to the extent the Contractor or his domestic subsidiaries or affiliates have failed to achieve the practical application of the invention in that foreign country.

(3) Before modification or revocation of the license, pursuant to paragraph (d)(2) of this clause, the Foundation shall furnish to the Contractor a written notice of its intention to modify or revoke the license and the Contractor shall be allowed 30 days (or such longer period as may be authorized by the Foundation for good cause shown in writing by the Contractor) after such notice to show cause why the license should not be modified or revoked.

(e) *Invention identification, disclosure and reports.* (1) The Contractor shall establish and maintain active and effective procedures to assure that Subject Inventions are promptly identified and timely disclosed. These procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of Subject Inventions and records which show that the procedures for identifying and disclosing the inventions are followed. Upon request, the Contractor shall furnish to the Contracting Officer a description of such procedures so that he may evaluate and determine their effectiveness.

(2) The Contractor shall furnish to the Contracting Officer:

(i) A complete disclosure of each Subject Invention, within 6 months after conception or first actual reduction to practice, whichever occurs first in the course of or under the contract, but in any event prior to any sale, public use, or publication of such invention known to the Contractor. The disclosure shall identify the contract and inventor and be sufficiently complete in technical detail and appropriately illustrated by sketch or diagram to convey to one skilled in the art to which the invention pertains a clear understanding of the nature, purpose, operation, and, to the extent known, the physical, chemical, biological, or electrical characteristics of the invention;

(ii) Interim reports at least every 12 months from the date of the contract listing Subject Inventions for that period and certifying that;

(A) The Contractor's procedures for identifying and disclosing Subject Inventions as required by this paragraph (e) have been followed throughout the reporting period; and

(B) All Subject Inventions have been disclosed or that there are no such inventions; and

(iii) An acceptable final report, within 3 months after completion of the contract work, listing all Subject Inventions or certifying that there were no such inventions.

(3) The Contractor shall obtain patent agreements to effectuate the provisions of this clause from all persons in his employ who perform any part of the work under this contract except nontechnical personnel, such as clerical employees and manual laborers.

(4) The Contractor agrees that the Government may duplicate and disclose Subject Invention disclosures and all other reports

and papers furnished or required to be furnished pursuant to this clause.

(f) *Forfeiture of rights in unreported subject inventions.* (1) Unless excused by the Foundation, the Contractor shall forfeit to the Government all rights on any Subject Invention which he fails to report to the Contracting Officer at or prior to the time he:

(i) Files or causes to be filed a United States or foreign application thereon; or

(ii) Submits the final report required by paragraph (e)(2)(iii) of this clause, whichever is later.

(2) However, the Contractor shall not forfeit rights in a Subject Invention if, within the time specified in (1)(i) or (ii) of this clause, the Contractor:

(i) Prepared a written decision based upon a review of the record that the invention was neither conceived nor first actually reduced to practice in the course of or under the contract; or

(ii) Contending that the invention is not a Subject Invention, he nevertheless discloses the invention and all facts pertinent to his contention to the Contracting Officer; or

(iii) Establishes that the failure to disclose did not result from his fault or negligence.

(3) Pending written assignment of the patent applications and patents on a Subject Invention determined by the Contracting Officer to be forfeited (such determination to be a final decision under the Disputes Clause), the Contractor shall be deemed to hold the intention and the patent applications and patents pertaining thereto in trust for the Government. The forfeiture provision of this paragraph (f) shall be in addition to and shall not supersede other rights and remedies which the Government may have with respect to Subject Inventions.

(g) *Examination of records relating to inventions.* (1) The Contracting Officer or his authorized representative shall, until the expiration of 3 years after final payment under this contract, have the right to examine any books, records, documents, and other supporting data of the Contractor which the Contracting Officer reasonably deems pertinent to the discovery of identification of Subject Inventions or to determine compliance with the requirements of this clause.

(2) The Contracting Officer shall have the right to review all records and documents of the Contractor relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this contract to determine whether any such inventions are Subject Inventions if the Contractor refuses or fails to:

(i) Establish the procedures of paragraph (e)(1) of this clause; or

(ii) Maintain and follow such procedures, or;

(iii) Correct or eliminate any material deficiency in the procedures within thirty (30) days after the Contracting Officer notifies the Contractor of such a deficiency.

(h) *Withholding of payments.* (1) Any time before final payment of the amount of this contract, the Contracting Officer may, if he deems such action warranted, withhold payment until a reserve not exceeding $50,000 or 5 percent of the amount of this contract, whichever is less, shall have been set aside if in his opinion the Contractor fails to:

(i) Establish, maintain, and follow effective procedures for identifying and disclosing Subject Inventions pursuant to paragraph (e)(1) of this clause; or

(ii) Disclose any Subject Invention pursuant to paragraph (e)(2)(i) of this clause; or

(iii) Deliver the interim reports pursuant to paragraph (e)(2)(ii) of this clause; or

(iv) Provide the information regarding subcontracts pursuant to paragraph (i)(5) of this clause.

The reserve or balance shall be retained until the Contracting Officer has determined that the Contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures and other information required by this clause.

(2) Final payment under this contract shall not be made before the Contractor delivers to the Contracting Officer all disclosures of Subject Inventions required by paragraph (e)(2)(i) of this clause and the final report required by (e)(2)(iii) of this clause.

(3) The Contracting Officer may, in his discretion, decrease or increase the sums withheld up to the maximum authorized above. No amount shall be withheld under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the contract. The withholding of any amount or subsequent payment thereof shall not be construed as a waiver of any rights acruing to the Government under this contract.

(i) *Subcontracts.* (1) For the purpose of this paragraph the term "Contractor" means the party awarding a subcontract and the term "Subcontractor" means the party being awarded a subcontract, regardless of tier.

(2) The Contractor shall, unless otherwise authorized or directed by the Government Contracting Officer, include this Patent Rights clause, modified to identify the parties in any subcontract hereunder, if a purpose of the subcontract is for the conduct of experimental, developmental or research work. In the event of refusal by a Subcontractor to accept this clause, or if in the opinion of the Contractor this clause is in-

consistent with the policy set forth in the President's Policy, the Contractor:

(i) Shall promptly submit written notice to the Government Contracting Officer setting forth reasons for the Subcontractor's refusal and other pertinent information which may expedite disposition of the matter; and

(ii) Shall not proceed with the subcontract without the written authorization of the Government Contracting Officer.

(3) The Contractor shall not, in any subcontract or by using a subcontract as consideration therefor, acquire any rights in his Subcontractor's Subject Invention for his own use (as distinguished from such rights as may be required solely to fulfill his contract obligations to the Government in the performance of his contract).

(4) All invention disclosures, reports, instruments, and other information required to be furnished by the Subcontractor to the Government Contracting Officer under the provisions of a Patent Rights clause in any subcontract hereunder may, in the discretion of the Government Contracting Officer, be furnished to the Contractor for transmission to the Government Contracting Officer.

(5) The Contractor shall identify all Subject Inventions of the Subcontractor of which he acquires knowledge in the performance of this contract and shall notify the Government Contracting Officer promptly upon the identification of the inventions.

(6) It is understood that the Government is a third party beneficiary of any subcontract clause granting rights to the Government in Subject Inventions, and the Contractor hereby assigns to the Government all rights that he would have to enforce the Subcontractor's obligations for the benefit of the Government with respect to Subject Inventions. The Contractor shall not be obligated to enforce the agreements of any Subcontractor hereunder relating to the obligations of the Subcontractor to the Government in regard to Subject Inventions.

(b) Except (1) when paragraph (c) of this section applies, or (2) where the contract will be subject to an Institutional Patent Agreement pursuant to 45 CFR 650.8, all contracts which are with nonprofit or not-for-profit organizations (including educational institutions) shall contain the clause at 45 CFR 650.4(b). However, in the case of such contracts for the operation of National Research Centers or similar facilities other provisions may be negotiated with the approval of the General Counsel; provided that such provisions shall be consistent with section 1(a)(4) of the President's Policy.

(c)(1) At the request of a prospective contractor, special provisions other than those provided in paragraphs (a) and (b) of this section may be negotiated where the award falls within section 1(b) of the President's Policy or where exceptional circumstances as set forth in section 1(a) of the President's Policy exist. In accordance with section 1(c) of the President's Policy, such provisions may also be negotiated at the time of award with educational or other non-profit or not-for-profit institutions having a demonstrated capability for effective patent management; provided that in such cases the provisions shall normally include the features described in 45 CFR 650.8(c).

(2) In negotiating such special provisions, Section 12(a) of the National Science Foundation Act, as amended, and the President's Policy will be followed.

(3) In the case of negotiations involving contracts falling within section 1(b) of the President's Policy, the clause at paragraph (a) of this section shall be used, except that the name of the clause shall be changed to "PATENT RIGHTS—OPTION IN THE CONTRACTOR," paragraph (b) of that clause shall be replaced by the following paragraph (b), and the following paragraphs (j) and (k) shall be added:

* * * * *

(b) *Disposition of principal rights.* (1) The Contractor may retain the entire right, title, and interest throughout the world or in any country thereof in and to each Subject Invention disclosed pursuant to paragraph (e)(2)(i) of this clause, subject to the rights obtained by the Government in paragraph (c) of this clause. The Contractor shall include with each Subject Invention disclosure an election as to whether he will retain the entire right, title, and interest in the invention throughout the world or any country thereof.

(2) Subject to the license specified in paragraph (d) of this clause, the Contractor agrees to convey to the Government, upon request, the entire domestic right, title, and interest in any Subject Invention when the Contractor:

(i) Does not elect under paragraph (b)(1) of this clause to retain such rights; or

(ii) Fails to have a United States patent application filed on the invention in accordance with paragraph (j) of this clause, or decides not to continue prosecution of such application; or

(iii) At any time, no longer desires to retain title.

(3) Subject to the license specified in paragraph (d) of this clause, the Contractor agrees to convey to the Government, upon request, the entire right, title, and interest in any Subject Invention in any foreign country if the Contractor:

(i) Does not elect under paragraph (b)(1) of this clause to retain such rights in the country; or

(ii) Fails to have a patent application filed in the country on the invention in accordance with paragraph (k) of this clause, or decides not to continue prosecution or to pay any maintenance fees covering the invention. To avoid forefeiture of the patent application or patent, the Contractor shall notify the Contracting Officer not less than sixty (60) days before the expiration period for any action required by the foreign patent office.

(4) A conveyance requested pursuant to paragraph (b)(2) or (3) of this clause shall be made by delivering to the Contracting Officer duly executed instruments (prepared by the Government) and such other papers as are deemed necessary to vest in the Government the entire right, title, and interest to enable the Government to apply for and prosecute patent applications covering the invention in this or the foreign country, respectively, or otherwise establish its ownership in such invention.

* * * * *

(j) *Filing of domestic patent applications.*

(1) With respect to each Subject Invention in which the Contractor elects to retain domestic rights pursuant to paragraph (b) of this clause, the Contractor shall have a domestic patent application filed within 6 months after submission of the invention disclosure pursuant to paragraph (e)(2)(i) of this clause, or such longer period as may be approved by the Contracting Officer for good cause shown in writing by the Contractor. With respect to the invention, the Contractor shall promptly notify the Contracting Officer of any decision not to file an application.

(2) For each Subject Invention on which a patent application is filed by or on behalf of the Contractor, the Contractor shall:

(i) Within 2 months after such filing, or within 2 months after submission of the invention disclosure if the patent application previously had been filed, deliver to the Contracting Officer a copy of the application as filed including the filing date and serial number;

(ii) Include the following statement, appropriately completed, in the second paragraph of the specification of the application and any patents issued on a Subject Invention. "The Government has rights in this invention pursuant to Contract No. ——— (or Grant No. ———) awarded by the National Science Foundation."

(iii) Within 6 months after filing the application or within 6 months after submission of the invention disclosure if the application has been filed previously, deliver to the Contracting Officer a duly executed and approved instrument on a form specified by the Government fully confirmatory of all rights to which the Government is entitled, and provide the agency an irrevocable power to inspect and make copies of the patent application filed;

(iv) Provide the Contracting Officer with a copy of the patent within 2 months after a patent issues on the application, and

(v) Not less than 30 days before the expiration of the response period for any action required by the Patent Office, notify the Foundation of any decision not to continue prosecution of the application and deliver to the Foundation executed instruments granting the Government a power of attorney.

(3) For each Subject Invention in which the Contractor initially elects not to retain principal domestic rights, the Contractor shall inform the Contracting Officer promptly in writing of the date and identity of any sale, public use, or publication of such invention which may constitute a statutory bar under 35 U.S.C. 102, which was authorized by or known to the Contractor, or any contemplated action of this nature.

(k) *Filing of foreign patent applications.*

(1) With respect to each Subject Invention in which the Contractor elects to retain rights in a foreign country pursuant to paragraph (b)(1) of this clause, the Contractor shall have a patent application filed on the invention in such country, in accordance with applicable statutes and regulations, and within one of the following periods;

(i) Eight months from the date of a corresponding United States application filed by or on behalf of the Contractor; or if such an application is not filed, 6 months from the date the invention is submitted in a disclosure pursuant to paragraph (e)(2)(i) of this clause;

(ii) Six months from the date a license is granted by the Commissioner of Patents to file foreign applications where such filing has been prohibited by security reasons; or

(iii) Such longer period as may be approved by the Contracting Officer.

(2) The Contractor shall notify the Contracting Officer promptly of each foreign application filed and, upon written request, shall furnish an English version of such for-

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eign application without additional compensation.

(4) In all other cases falling within this paragraph (c), the "PATENT RIGHTS—OPTION IN THE GOVERNMENT" clause prescribed at § 25-9.103(a) shall be used with appropriate modifications of that clause so as to allow the Contractor to obtain greater rights than a non-exclusive license as to all or specific inventions. These modifications should reflect the requirements of paragraph (c)(1) of this section, if applicable, and, in addition, particularly where the contract would fall within section 1(a)(1)-(4) of the President's Policy, consideration should be given to including provisions to ensure that research results are made available to the public in accordance with the policy set forth in § 25-9.106.

(5) The inclusion of special provisions in a contract in accordance with this section, other modifications of the clauses prescribed by this subpart, or the waiver of any of the requirements of the clauses prescribed by this subpart, shall be approved by the General Counsel. In cases where the General Counsel does not grant such approval, interested Foundation staff may refer the matter to the NSF Patent Policy Review Committee.

§ 25-9.104 Greater rights determination.

(a)(1) Contractors desiring to retain rights in inventions made under or during the course of contracts containing provisions that condition the retention of principal rights in such inventions by the contractor on the determination of the Foundation, such as those prescribed at § 25-9.103(a), should address their request to the General Counsel who has been delegated authority to make such determinations. In all such cases the General Counsel shall seek the recommendations and advice of the Patent Policy Review Committee.

(2) Such requests should contain the following information:

(i) The contract number, and subcontract number is applicable, under which the invention was made;

(ii) A complete invention disclosure or reference to one that has previously been furnished, including any NSF identifying numbers, if known;

(iii) A description of the relationship of the invention to the main purpose of the contract;

(iv) The contractor's evaluation of the commercial possibilities of the invention both in its original embodiment and in possible adaptations to other uses;

(v) An explanation of why it is believed that rights greater than free public use are needed to bring the invention into use;

(vi) The nature and extent of the rights desired;

(vii) A description of the stage of development of the invention, and an estimate of the cost of development, capital and time required to bring the invention to the point of practical application as defined in the President's Policy;

(viii) A statement of the contractor's plans and intentions to bring the invention to the point of practical application including:

(A) If further development is to be conducted by the contractor, a description of the facilities, source of funds, personnel, and marketing outlets available for that purpose and the extent to which such development is to be undertaken by the contractor or others on his behalf and/or

(B) If he intends to license the invention, a brief description of his licensing program;

(ix) A statement of any equities in the invention which the contractor believes it has in the invention which would be appropriate for consideration by the Foundation;

(x) If other Government agencies have contributed to the cost of making the invention, the identification of such agencies and the grant or contract involved, and the approximate share of each;

(xi) A listing of other countries in which the contractor would be interested in filing applications for patents;

(xii) If publication of the substance of this invention has occurred or is planned or there has been a use or sale such as might possibly create a future statutory bar to the patenting of the invention, the name of the journal, the date or probable date of publi-

cation, a reprint of the article if it has been published or a copy of the draft as submitted for publication, and/or details regarding the use or sale of the invention;

(xiii) An identification and indication of the ownership of any patents, patent applications, or invention disclosures known to the contractor which would affect the practice of the invention.

(b) Determinations under this section shall be made on the basis of the guidelines set forth in the President's Policy and this subpart. In addition, the relationship of the invention to other technology controlled by the contractor shall be considered as discussed in § 25-9.106.

(c)(1) In cases where principal rights in an invention are left with a contractor which, itself, is not expected to further develop the invention, the Foundation will require the contractor to make reasonable attempts to license inventions on a nonexclusive basis; provided that an exclusive license may be granted if the contractor determines that an exclusive license is necessary as an incentive for development of the invention or because market conditions are such as to require licensing on an exclusive basis in order to bring the invention into use. This determination shall be in writing and supplied to the Foundation at or before the time an exclusive license is granted. Any such exclusive license granted under a domestic patent or patent application will normally be limited to a period of three years from first commercial sale or eight years from the inception of the license agreement, whichever occurs first. Thereafter, unless the original exclusive license period is extended with the approval of the Foundation, additional licenses will be made available on a nonexclusive basis at a royalty not greater than that charged to the exclusive licensee.

(2) In addition to the requirements of paragraph (c)(1) of this section, any determination under this section shall reserve to the Government the rights set forth in § 25-9.105. In addition, if he has not already done so, the contractor shall be required to have a domestic patent application filed on the invention within 6 months from the date of the determination, or such longer period as may be authorized by the Foundation for good cause shown by the contractor. Each determination shall also include appropriate provisions concerning foreign rights. The determination may also include such other provisions as are considered appropriate.

(3) When neither the grantee, the employee-inventor, nor any other Government agency notified of the invention by the Foundation wishes to take principal rights in an invention, it shall normally be dedicated to the public through publication.

§ 25-9.105 Minimum government rights.

In all cases where the contractor or any other person or entity has been allowed to retain or obtain principal rights in an invention, or possible future inventions, whether at the time of award or after an invention has been identified, the Foundation shall reserve the following minimum rights, if not otherwise required by or inconsistent with any other provision of this subpart.

(a) A nonexclusive, nontransferable, paid-up license to make, use, and sell the invention throughout the world by or on behalf of the Government of the United States (including any Government agency) and States and domestic municipal governments, unless the Director determines that it would not be in the public interest to acquire the license for the States and domestic municipal governments.

(b) The right to sublicense any foreign government pursuant to any existing or future treaty or agreement, but only if the Director determines it would be in the national interest to acquire this right.

(c) The principal or exclusive rights to the invention (or the right to acquire the same) in any country in which the contractor does not elect to secure a patent.

(d) The right to require written reports at reasonable intervals on the commercial use that is being made or is intended to be made of the invention.

(e) The right to require the inclusion of the following appropriately completed statement in the second paragraph of the specification of any patent application or patent: "The Government has rights in this invention pursuant to Contract No. ——— awarded by the National Science Foundation."

(f) The right to require the granting of a nonexclusive or exclusive license to a responsible applicant on terms that are reasonable under the circumstances (1) unless it is determined that effective steps have been taken within three years after a patent issues on the invention to bring the invention to the point of practical application, or that the invention has been made available for licensing royalty-free or on terms that are reasonable under the circumstances or unless cause can be shown why the Foundation should not exercise this right for some further period of time; (2) to the extent the invention is determined to be necessary to fulfill health or safety needs; or (3) to the extent the invention is determined to be needed for other public purposes stipulated in the contract. Determinations and other actions taken pursuant to this paragraph (f) shall be by the Director or by such person(s) as he may designate.

(g) The right to approve any license covering the invention proposed to be granted to any of the following persons or organizations:

(1) Any person who participated as an employee of the contractor in the research leading to the conception and/or actual reduction to practice of the invention;

(2) An organization of which a person described in paragraph (g)(1) of this section was an active promoter or organizer or in which such a person is an officer, director, or holds a substantial interest;

(3) An organization of which the contractor was an active promoter, organizer, or financer.

Approval of such a license shall be given only if the contractor can show that a bona fide effort was made without success to interest other organizations known to be interested in the subject matter of the invention in becoming licensees, or can otherwise show why the public interest will best be served by the proposed licensing arrangement. Notwithstanding anything above, this paragraph (g) shall not apply in the case of a contract with a for-profit contractor.

§ 25-9.106 Availability of inventions to the public.

(a) A major objective of the Foundation is to encourage the use of inventions arising out of activities supported by the Foundation. It is important that any useful product or process developed or improved under a contract is made available to the public on reasonable terms. In some cases, to ensure such availability it may be necessary, either at the time of award or in connection with the determination under § 25-9.104, to require the contractor to furnish to responsible applicants technical data or rights in other inventions to the extent necessary to practice the invention made or product or process developed or improved under the contract.

(b) Program managers or other Foundation personnel shall refer cases involving preexisting proprietary technology (such as "proprietary data," "trade secrets," patents, or patent applications) to the General Counsel or the Patent Policy Review Committee in accordance with applicable Staff Memoranda.

§ 25-9.107 Delegations.

The General Counsel is authorized to make any determinations required by these regulations to be made by the Director, including determinations required by the President's Policy to be made by the head of the agency, except those specified in § 25-9.105(f).

PART 25-30—CONTRACT FINANCING

Subpart 25-30.1—Forms of Financing

§ 25-30.103 Advance payments.

The NSF legislation provides that advance, progress, or other payments which relate to scientific activities or scientific information may be made without regard to the Provisions of section 3648 Revised Statutes (31 U.S.C. 529). Advance payments may be

made in any amount not exceeding the contract price, provided (a) the amount of the advance payment is based upon an analysis of the financing required by the contractor for the contract and does not exceed reasonable financial requirements between payments, and (b) such advance payment is appropriate in order to contract for the required work.

(42 U.S.C. 1861-1875, 1876-1879; 33 U.S.C. 1121-1124; 63 Stat. 37, as amended; 41 U.S.C. 201 note)

[34 FR 1440, Jan. 30, 1969]

PART 25-50—SPECIAL AUTHORITIES

Subpart 25-50.1—Additional Authorities

§ 25-50.101 Additional authority of the National Science Foundation.

The Foundation has special authority under the National Science Foundation Act, as amended, 42 U.S.C. 1861-1875, Title IX of the National Defense Education Act, 42 U.S.C. 1876-1879, and the National Sea Grant College and Program Act, 33 U.S.C. 1121-1124. For example, the Foundation has authority:

(a) To enter into and amend contracts, for the carrying on of scientific activities and science information activities, without advertising, without legal consideration and without performance or other bonds;

(b) To publish or arrange for the publication of scientific and technical information (permitting exceptions from certain Government Printing Office procedures);

(c) To prescribe, with the approval of the Comptroller General, special accounting procedures;

(d) To acquire by purchase, lease, loan, gift, or condemnation, and to hold and dispose of by grant, sale, lease, or loan, real and personal property of all kinds necessary for, or resulting from, the exercise of authority granted by the National Science Foundation Act or the National Defense Education Act.

(42 U.S.C. 1861-1875, 1876-1879; 33 U.S.C. 1121-1124; 63 Stat. 37, as amended; 41 U.S.C. 201 note)

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PART 28–1—GENERAL

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28–1.404–51 Redelegation of contracting officer authority.
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28–1.404–53 Contracting officer's representatives to contractors.
28–1.404–54 Contracting officer's representative—receipt of supplies, equipment or services.
28–1.405 Ratification of unauthorized contract awards.

AUTHORITY: 40 U.S.C. 486(c); 28 CFR 0.75 (j) and 0.76(j), unless otherwise noted.

SOURCE: 41 FR 32426, Aug. 3, 1976, unless otherwise noted.

Subpart 28–1.1—Introduction

§ 28–1.101 Scope of Subpart.

This subpart establishes the Department of Justice Procurement Regulations (JPR) as Chapter 28 of the Federal Procurement Regulations System (41 CFR Ch. 28) and states the relationship of the JPR to the Federal Procurement Regulations (FPR), 41 CFR Ch. 1.

§ 28–1.102 Purpose.

The purpose of these regulations is to provide direction, control and uniformity in the Department's procurement of personal property and nonpersonal services (including construction).

§ 28–1.103 Authority.

JPR are issued under the Federal Property and Administrative Services Act of 1949, as amended and §§ 0.75(j) and 0.76(j) of Title 28, Code of Federal Regulations.

§ 28–1.104 Applicability.

The FPR as implemented and supplemented by the JPR apply to the procurement operations of all Department of Justice procuring activites. However, nothing in those regulations shall impair or affect the authority of the Federal Prison Industries with respect to any program conducted for the purpose of rehabilitation, *Provided*, That the Federal Prison Industries shall, to the maximum extent practicable, consistent with the fulfillment of the purposes of the program and the effective and efficient conduct of its business, coordinate its operations with the requirements of the regulations prescribed by the FPR and JPR. Therefore, the Federal Prison Industries shall comply with those regulations except for reasons peculiar to the operation of the Federal Prison Industries. Where compliance with a specific regulation would be inconsistent with Federal Prison Industries programs, a deviation shall be requested in accordance with § 28–1.109–2(b).

§ 28–1.105 Exclusions.

(a) Certain Department of Justice procurement policies and procedures which come within the scope of this Chapter 28 may nevertheless be excluded under special circumstances such as the following:

(1) The subject matter has a security classification.

(2) The policy or procedure is expected to be effective for a period of less than 6 months.

(3) The policy or procedure is being instituted on an experimental basis for a reasonable period.

(4) The policy or procedure must be implemented in less time than is required to incorporate it as a part of this Chapter 28.

(b) Policies and procedures issued under paragraph (a)(4) of this section will be codified into Chapter 28 not later than 6 months from the date of issue.

Subpart 28-1.2—Definition of Terms

§ 28-1.205 Procuring activities.

(a) "Procuring activity" means any of the following elements of the Department of Justice:

(1) Justice Management Division, Property Management and Procurement Staff.

(2) Drug Enforcement Administration.

(3) Federal Bureau of Investigation.

(4) Federal Prison Industries.

(5) Law Enforcement Assistance Administration.

(6) U.S. Marshals Service.

(7) Immigration and Naturalization Service.

(8) Bureau of Prisons.

(28 U.S.C. 509 and 510)

[41 FR 32426, Aug. 3, 1976, as amended at 44 FR 61346, Oct. 25, 1979]

§ 28-1.206 Head of the procuring activity.

"Head of the procuring activity" means those officials identified in § 28.1.404-50(a) having the responsibility for supervision and direction of the procuring activities identified in § 28-1.205.

Subpart 28-1.3—[Reserved]

Subpart 28-1.4—Procurement Responsibility and Authority

§ 28-1.404-50 Delegation of contracting officers.

(a) Pursuant to 28 CFR 0.139(a), the authority vested in the Attorney General to execute, award and administer contracts, including purchase orders, Government bills of lading and other agreements for the expenditure of funds in the acquisition of supplies, nonpersonal services, personal services negotiated under the authority of FPR 1-3.204, for the sale of personal property and to take such actions specifically designated as the responsibility of the contracting officer by the FPR and JPR is hereby delegated to those employees appointed, designated to or acting in the following positions:

(1) Director, Property Management and Procurement Staff, Justice Management Division.

(2) Director, Federal Bureau of Investigation.

(3) Director, Bureau of Prisons.

(4) Commissioner, Federal Prison Industries.

(5) Commissioner, Immigration and Naturalization Service.

(6) Administrator, Drug Enforcement Administration.

(7) Administrator, Law Enforcement Assistance Administration.

(8) Director, U.S. Marshals Service.

(b) In addition to the authority delegated by the Attorney General in paragraph (a) of this section, the LEAA derives procurement authority from the Omnibus Crime Control and Safe Streets Act of 1968; however, the Departmentwide procurement policy of the Attorney General must be adhered to by the LEAA.

(28 U.S.C. 509 and 510)

[41 FR 32426, Aug. 3, 1976, as amended at 44 FR 61346, Oct. 25, 1979]

§ 28-1.404-51 Redelegation of contracting officer authority.

(a) The contracting officers listed in § 28-1.404-50(a) may redelegate authority to one or more of their subordinates to act as contracting officers. Such delegated authority shall be without power of further redelegation except as follows:

(1) Contracting authority delegated by the Director, Bureau of Prisons; Commissioner, Federal Prison Industries; and the Director, U.S. Marshals Service to Regional Office heads and heads of offices of individual field installations may be further delegated to subordinate individuals at the respective regional offices and installations without power of redelegation.

(2) Contracting authority delegated by the Commissioner, Immigration and Naturalization Service to Heads of Regional Offices may be further delegated to (i) subordinate individuals to provide supply support for the Regional Office, without power of redelegation and (ii) heads of District and/or Sector Offices who may redelegate such authority to subordinate individuals without power of further redelegation.

(b) Contracting authority to other than those positions expressly identi-

fied in paragraph (a) of this section shall be redelegated only to subordinate individuals who (1) are actively engaged in procurement, (2) must function as contracting officers in the performance of their duties and (3) meet the qualification requirements of FPR 1-1.404. However, authority to make individual small purchases by the imprest funds (petty cash) method (FPR 1-3.604) may be delegated to subordinate individuals not actively engaged in procurement, *Provided,* (i) That the office(s) they serve would otherwise be without supply support for their immediate needs and (ii) that they have been adequately instructed in the regulations concerning small purchases. The redelegation of contracting authority directly to specific persons without regard for intermediate organizational levels only establishes authority to represent the Government in its commercial business dealings. It is not intended to affect the organizational relationship between the contracting officers and higher administrative and supervisory levels in the performance of their duties.

(c) Designations to other than those positions expressly identified in paragraph (a) of this section shall be made only to individuals. Designations, whether to individuals or by position, shall be in writing and shall specifically state the scope and limitation of the designated contractual authority. A copy of each designation shall be forwarded to the Assistant Attorney General for Administration, Justice Management Division.

(d) When exercising delegated contracting authority, a designated employee shall be identified as the contracting officer and shall function within the limits prescribed by law, the FPR and JPR.

(e) A contracting officer shall maintain evidence of his delegation and scope of authority and while functioning as a contracting officer shall make such evidence available upon request by anyone.

(28 U.S.C. 509 and 510)

[41 FR 32426, Aug. 3, 1976, as amended at 44 FR 61346, Oct. 25, 1979]

§ 28-1.404-52 Modification of contracting officer's delegation.

Designation documents shall not be modified. To effect modification, the current delegation shall be revoked and a new delegation issued.

§ 28-1.404-53 Contracting officer's representatives to contractors.

(a) Contracting officers, other than those delegated authority to purchase only by the imprest fund (petty cash) method under § 28-1.404-51(b), may designate other Government employees to act as their authorized representative to the contractor for specified purposes of contract administration. Such designation shall contain specific instructions as to the extent to which the representative has been delegated authority to take action for the contracting officer. The designation shall state that it does not include authority to sign contractual documents or to otherwise make commitments or issue changes which will affect the price, quantity, quality or performance terms of the contract as these rights are reserved to the contracting officer. The designation may include authority such as the following:

(1) To act as liaison and to coordinate contractor/government activities.

(2) To arrange for and coordinate the use of government resources (personnel, space, documents, etc.).

(3) To provide technical guidance in the performance of the contract.

(4) To receive, review and approve (but not reject or deny), progress reports, invoices, final reports or other functions of a technical nature.

(b) Designations shall be in writing to the designee and a copy shall be furnished to the contractor. This may be accomplished by inclusion in the contract or by a separate document.

§ 28-1.404-54 Contracting officer's representative—receipt of supplies, equipment or services.

(a) A contracting officer, other than those delegated authority to purchase only by the imprest fund (petty cash) method under § 28-1.404-51(b). may, without notice to the contractor, designate other competent Government

personnel, by name or by position and location to represent him in receiving and inspecting supplies, equipment or services. Duties such as, but not limited to, the following may be performed by these designees:

(1) The inspection and certification as to compliance with quality and quantity requirements; and

(2) Inspection of supplies and equipment for condition and quantity and the acceptance of supplies, equipment or services based on quality inspections made by other authorized representatives.

(b) Designation shall be accomplished by a written notice and as may be otherwise prescribed by the head of the procuring activity.

(c) Representatives shall not advise contractors as to either acceptable or unacceptable contract performance. Findings and recommendations shall be provided to the contracting officer as appropriate. Notices to contractors concerning receipt of unacceptable supplies, equipment or services shall be made only by the contracting officer.

§ 28-1.405 Ratification of unauthorized contract awards.

In each instance where an unauthorized contract award occurs (including small purchases), whether ratified or not, the head of the procuring activity shall report the following data to the Assistant Attorney General for Administration, Justice Management Division.

(a) Circumstances regarding the unauthorized contract.

(b) Vendor.

(c) Product or service.

(d) Value.

(e) Action taken by procuring activity.

(28 U.S.C. 509 and 510)

[41 FR 32426, Aug. 3, 1976, as amended at 44 FR 61346, Oct. 25, 1979]

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AUTHORITY. 63 Stat. 389 (40 U.S.C. 486(c)); 80 Stat. 379 (5 U.S.C. 301); sec. 202, Pub. L. 95-507, 92 Stat. 1761 (15 U.S.C. 637(a)); sec. 221, Pub. L. 95-507, 92 Stat. 1770 (15 U.S.C. 644).

SOURCE: 36 FR 3054, Feb. 17, 1971, unless otherwise noted.

NOTE: Nomenclature changes appear at 38 FR 15965, June 19, 1973.

§ 29-1.000 Scope of part.

This part establishes a system of procurement regulations and procedures applicable to procurement of property and services necessary to the operations of the Department of Labor (DOL). This system is based upon the Federal Property and Administrative Services Act of 1949, as amended, and is comprised of the Federal Procurement Regulations (i.e., Chapter 1 of Title 41 of the Code of Federal Regulations and referred to herein as FPR), and Department of Labor Procurement Regulations (i.e., Chapter 29 of Title 41 of the Code of Federal Regulations and referred to herein as DOLPR), which are herein established. This part describes the method and contains the policies and procedures by which DOL implements, supplements, and may deviate from the FPR.

Subpart 29-1.0—Regulation System

§ 29-1.001 Scope of subpart.

This subpart sets forth introductory information pertaining to the DOLPR. It explains the purpose of the DOLPR, the authority under which they are issued, their relationship to the FPR, and their applicability, method of issuance, exclusions, and arrangement. This subpart also outlines procedures for implementing, supplementing, and deviating from the FPR.

§ 29-1.002 Purpose.

This subpart establishes the system for the codification and publication of uniform policies and procedures that shall constitute the DOLPR.

§ 29-1.003 Authority.

DOLPR are authorized by Federal statute and implementing administrative regulations. Specific authority is provided by 5 U.S.C. 301; section 205(c) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 486(c)); the FPR; and 33 FR 12600, September 5, 1968 (See § 29-1.204).

§ 29-1.004 Applicability.

(a) The FPR and DOLPR apply to all DOL procurement (hereinafter referred to as "contracts") including contracts, agreements, purchases, orders, or similar instruments which obligate funds for the purposes of obtaining property and services for the Department of Labor or third parties or for the purpose of promoting Departmental programs or objectives through financial assistance. Unless otherwise specifically stated, DOLPR does not apply to grants.

(b) The DOLPR implement and supplement the FPR. Material published in the FPR, which has Government-wide applicability, becomes applicable to all DOL contracting upon the effective date of the particular FPR material. Such material generally will not be repeated, paraphrased, or otherwise restated in the DOLPR. The absence of a corresponding part, subpart, sec-

tion, or subsection in the DOLPR indicates that the FPR, as written, is applicable to all DOL contracts.

(c) Implementing material is that which expands upon related FPR material. It will treat a similarly numbered portion of the FPR in greater detail or indicate the manner of compliance or deviation.

(d) Supplementing material is that for which there is no counterpart in the FPR.

§ 29-1.006 Issuance.

§ 29-1.006-1 Code arrangement.

Chapter 1 of Title 41 of the Code of Federal Regulations contains procurement regulations for general application to all agencies. Specific succeeding chapters are assigned to the various agencies for their implementing and supplementing material. DOL is exclusively assigned Chapter 29 for its contracting material.

§ 29-1.006-2 Publication.

The DOLPR appear in the Code of Federal Regulations as Chapter 29 of Title 41, Public Contracts and Property Management. The DOLPR are published, as they are issued in the daily issues of the FEDERAL REGISTER and in cumulated form in the annually published Code of Federal Regulations.

§ 29-1.006-3 Copies.

Copies of the DOLPR in both the FEDERAL REGISTER and the Code of Federal Regulations form may be purchased from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

§ 29-1.006-4 Coordination.

Responsibility for the development of the DOLPR is assigned to the Assistant Secretary for Administration and Management. In developing those regulations, the Assistant Secretary will solicit the views of the Agencies concerned. In addition to the Assistant Secretary's responsibilities imposed by statute and regulation, the Solicitor is responsible for determining the legality of all proposed regulations and policy and for making arrangements for the publication of those regulations and any subsequent implementation thereof in the FEDERAL REGISTER.

[36 FR 3054, Feb. 17, 1971, as amended at 42 FR 40197, Aug. 9, 1977]

§ 29-1.007 Arrangement.

§ 29-1.007-1 General plan.

The DOLPR employ the same general numbering system and nomenclature used in the FPR.

§ 29-1.007-2 Numbering.

(a) A particular procurement policy or procedure is identified by the same number in both the FPR and DOLPR except that the number preceding the particular part, subpart, section, or subsection is either "1" if the reference is to FPR or "29" if the reference is to DOLPR.

(b) Where Chapter 29 implements a part, subpart, section, or subsection of the FPR, the implementing part, subpart, section, or subsection of Chapter 29 will be numbered (and captioned) to correspond to the FPR part, subpart, section, or subsection.

(c) Where Chapter 29 supplements the FPR and thus deals with subject matter not contained in the FPR, numbers in the group 50 through 99 will be assigned to the respective supplementing part, subpart, section, or subsection.

(d) Where the subject matter contained in the part, subpart, section, or subsection of the FPR requires no implementation, the DOLPR will contain no corresponding part, subpart, section, or subsection. Thus, there may be gaps in the DOLPR of part, subpart, section, or subsection numbers. In such cases, reference must be made to the FPR for policy and procedure applicable to all DOL contracts.

§ 29-1.008 Agency implementation.

§ 29-1.008-50 Department of Labor (DOL) Agency implementation.

DOL Agencies may implement or supplement the FPR or DOLPR with internal instructions whose applicability is not DOL-wide, but nevertheless necessary to implement or supplement the FPR or the DOLPR. DOL Agencies may request publication in the

DOLPR of procurement instructions and other procurement material considered of interest to the general public. Such instructions shall not extensively repeat, paraphrase, or otherwise restate the FPR or the DOLPR and shall be numbered in accordance with § 1-1.007-2 of this title except that the numbers prescribed there and in § 29-1.007-2 shall be suffixed by the alphabetic abbreviation or other symbol of the respective Agency issuing the instructions. Whether the instructions are to be published as part of the DOLPR or not, such proposed instructions and material that implement or supplement the DOLPR or the FPR must be submitted, prior to their publication, for the review and concurrence of the Assistant Secretary for Administration and Management and of the Solicitor. In the case of internal procurement instructions, the purpose of such review is to ascertain that such instructions are consistent with the FPR and the DOLPR and that they do not contain material which should be issued as the DOLPR. In the case of instructions or other material submitted for inclusion in the DOLPR, after concurrence by interested DOL Agencies, the necessary arrangements will be made for publication of such instructions or other material in the FEDERAL REGISTER.

[42 FR 40197, Aug. 9, 1977]

§ 29-1.009 Deviation.

§ 29-1.009-2 Procedure.

Deviations (as described in § 1-1.009-1 of this title) shall be kept to a minimum and shall be controlled as follows:

(a) Deviations from either the FPR or the DOLPR in both individual cases and classes of cases must be approved in advance by the Assistant Secretary for Administration and Management. Requests for approval of such deviations may be initiated by contracting officers. Requests shall be submitted, in writing, to the Assistant Secretary for Administration and Management either directly or with such prior preliminary approvals as may be required by the internal procedures of the contracting officer's Agency. Such requests shall be submitted as far in advance as the exigencies of the situation will permit. Each request for a deviation shall contain the following:

(1) A clear statement of the deviation desired;

(2) The reasons the deviation is considered necessary and would be in the best interest of the Government;

(3) The name of the contractor and identification of the contract affected, if applicable;

(4) A statement as to whether the deviation has been requested previously, and, if so, the circumstances and disposition of the previous request; and

(5) Any pertinent background information which will contribute to a full understanding of the desired deviation including, but not limited to, the identification of the specific programs affected together with suitable notation that appropriate notice, including information copies of the request for deviation, has been given to the director or other chief official of the program or activity affected.

(b) If a requested deviation is considered appropriate, approval will be provided where the deviation applies to an individual case by memorandum addressed to the requesting office with copies to interested offices. The requesting office shall retain a copy of each request for approval and the disposition made thereon in its contract files.

(c) Where the deviation is from the FPR and applies to a class of cases, if time permits, necessary coordination with the General Services Administration will be effected by the Assistant Secretary for Administration and Management. Such class deviations shall be issued as a part of the DOLPR. Where time does not permit, the Assistant Secretary for Administration and Management may authorize a deviation, and by telephone, if need be, with later confirmation in writing. In such an instance, this official will later inform GSA of the deviation and circumstances under which it was required. Whenever a requested deviation is disapproved, the notice thereof shall be in writing, by the Assistant Secretary for Administration

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and Management, with copies to other interested offices.

(d) When a deviation in a contract form or provision is authorized, physical alteration or change may not be made in the printed form itself but shall be made by appropriate written notation in the schedule, specification, or elsewhere, under an appropriate title (e.g., under a part of a schedule entitled, "Alteration to General Provisions") which directs the reader's attention to the change in a manner that permanently fixes the extent of the change for a particular transaction or instrument.

(e) New FPR issuances should be carefully reviewed upon receipt so that requests for deviations can be acted upon prior to the effective date, whenever practicable.

(f) A central record of deviations, including copies of requests, approvals, and disapprovals, will be maintained by the Assistant Secretary for Administration and Management.

[36 FR 3054, Feb. 17, 1971, as amended at 42 FR 40198, Aug. 9, 1977]

Subpart 29–1.2—Definition of Terms

§ 29–1.204 Head of the agency.

Where the FPR and the DOLPR refer to the "head of the agency" or "agency head" as a level of approval, such a reference shall mean the Assistant Secretary for Administration and Management.

Subpart 29–1.3—General Policies

§ 29–1.302 Procurement sources.

§ 29–1.302–3 Contracts between the Government and Government employees or business concerns substantially owned or controlled by Government employees.

(a) No contracts, including those for rental of real or personal property, shall be let under the circumstances set out in § 1–1.302–3(a) of this title, except as provided in the FPR and DOLPR. Nor shall contracts knowingly be entered into, subject to the same exception, which will result in subcontracts, regardless of tier, with employees of the Government or business concerns or organizations which are substantially owned or controlled by Government employees.

(b) Approval of a decision to grant an exception as provided from § 29–1.302–3(a) shall be obtained, in writing, from the Assistant Secretary for Administration and Management by the head of the procuring activity.

§ 29–1.302–50 Contracts between the Government and former Government employees.

Negotiated contracts or grants or amendments to existing contracts or grants which constitute new procurement (including those for the rental of real or personal property) may be entered into with former employees of DOL or with firms in which former employees are known to have a substantial interest, within a period of 1 year subsequent to the termination of the individual's employment by DOL, only with the prior written approval of the Assistant Secretary for Administration and Management.

[42 FR 40198, Aug. 9, 1977]

§ 29–1.303 Approval signatures.

Contracting officers will personally sign all contracts and modifications thereto. Duly authorized contracting officer representatives for purposes of administering and monitoring contracts may sign contract correspondence while acting within the scope of the authority delegated to them. The signing of contractual instruments, including modifications, will not be accomplished by facsimile stamps.

§ 29–1.305 Specifications.

§ 29–1.305–3 Deviations from Federal Specifications.

Any deviation from a Federal specification contemplated under § 1–1.305–3 of this title shall be submitted, prior to its use, for approval to the head of the procuring activity who shall be the designated official within the meaning of § 1–1.305–3 of this title. The request shall include a statement describing the deviation being requested together with any justification and, where applicable, a recommendation for revi-

sion or amendment of the specification itself.

§ 29–1.315 Use of liquidated damages provisions in procurement contracts.

§ 29–1.315–2 Policy.

(a) Determination as to the use of liquidated damages provisions in a contract, and of the rate of such damages, is solely the responsibility of the contracting officer. In making the determination, the contracting officer shall obtain essential facts from the requisitioning office and be guided by a strict application of the criteria set forth in § 1–1.315–2 of this title and by the following general policies:

(1) Liquidated damages provisions will not be used routinely in DOL contracts, but they may be used when failure to meet the completion or delivery schedule will likely cause DOL to suffer substantial damages, the amount of which is difficult or impossible to determine or prove.

(2) Where the quantity of an item being procured includes a number of items the need for which is urgent, care shall be taken to have the liquidated damages provisions apply only to the urgently needed quantity. However, where rates are applied to quantities or groups, assessment of damages will not be prorated for delay of partial quantities.

(3) Liquidated damages provisions generally should not be used: (i) In contracts for supplies or services required for routine administrative purposes; (ii) in contracts for standard commercial or "off-the-shelf" items; (iii) in any contract where time of performance is not a primary factor; (iv) in small purchases (under $10,000); (v) in study, experimental, development, or research contracts including equipment contracts requiring developmental work; and (vi) where the delivery schedule does not reflect the date the item is actually needed but the date the item is desired.

(4) A fixed formula, based on percentage of value, shall not be used to establish the rate of damages. Consideration shall be given to the following factors in establishing the rate of damages: (i) The number of programs affected; (ii) the importance of the item in relation to the program for which it is intended; (iii) the relative importance of the program or programs in the overall mission of DOL; (iv) the reasonableness of the lead time for delivery in the contract schedule; and (v) any unusual damages that can be anticipated.

(5) Unless it is clear that partial delivery will proportionately reduce the extent of probable damages, rates shall not be applied to individual units of an item, but rather to quantities of an item or to groups of items which are required for delivery or completion at the same time. Rates should generally be expressed in terms of even dollars per day of delay per unit of the quantity of units to which the clause is applicable. When making partial or progress payments due anytime after the delivery date has passed for undelivered items covered by a liquidated damages provision, deductions for liquidated damages should be made for the actual number of days of delay that have elapsed from the time of the scheduled delivery to the time the partial or progress payment was due to the contractor.

(b) Any contract providing for liquidated damages shall contain a maximum dollar limitation on contractor's total liability as a result of the liquidated damages clause, which limit shall be appropriate for the circumstances of the particular procurement. In no event, however, shall such a dollar limit exceed the total amount of dollars the Government would have owed the contractor for full, complete, timely, and satisfactory performance.

(c) When liquidated damages provisions are used in a contract, the contracting officer is responsible for the adequacy of documentation in the file showing why delivery is critical, the nature of the damage that would be suffered by the Government if the contractor failed to make delivery and why the amount of such damages is either impossible to ascertain or prove either at the time the contract is awarded or within a reasonable time thereafter.

(d) Where liquidated damage provisions are used, they shall be strictly enforced. In such cases where the contractor's delay was clearly caused, at

least in part, by the Government which contributed, substantially if not exclusively, to the contractor's delayed delivery, the contracting officer shall take such matters into consideration as well as any other legal excuse of the contractor and shall make findings appropriate to the situation. However, it shall be the contractor's responsibility to give notice of delays in connection with any request for contract time extension or request for remission of damages, in whole or in part. In either event, the request shall be amply documented by the contractor. If it is determined that the liquidated damages are applicable, the contracting officer shall have no authority to waive any Government rights in the matter. This does not preclude the contracting officer's initiating recommendations for remission of liquidated damages by the Comptroller General.

(e) A submission to the Comptroller General recommending the remission of liquidated damages in accordance with 41 U.S.C. 256a shall be prepared for the signature of the Assistant Secretary for Administration and Management. All relevant facts and documents shall accompany the submission, e.g.: (1) Conditions which prompted the assessment of damages, (2) findings and decisions of the contracting officer, and (3) the decision of the Board of Contract Appeals, if any.

(f) On a default termination of a fixed price supply contract, liquidated damages continue to accrue, even after default, until the DOL can reasonably obtain delivery of the items through reprocurement. This is in addition to any other DOL remedy under the Default provision for recovering the excess costs to DOL of reprocuring from other sources the items that were to have been obtained in the terminated contract. If, however, the DOL does not reprocure the items, liquidated damages shall not be assessed against the contractor.

[36 FR 3054, Feb. 17, 1971, as amended at 42 FR 40198, Aug. 9, 1977]

§ 29-1.318 Disputes clause.

§ 29-1.318-1 Contracting officer's decision under a Disputes clause.

When a final decision of the contracting officer involves a dispute that is or may be subject to the Disputes clause, the paragraph set forth below shall be included in the decision:

This decision is made in accordance with the Disputes clause and shall be final and conclusive as provided therein, unless within 30 days from the date of receipt of this decision, a written notice of appeal (in triplicate) addressed to the Secretary of Labor is mailed or otherwise furnished to the Contracting Officer. The notice of appeal, which is to be signed by you as the contractor, or by an attorney acting on your behalf, and which may be in letter form, should indicate that an appeal is intended, shall refer to this decision, and shall identify the contract by number. The notice of appeal should include a statement of the reasons why the decision is considered to be erroneous, a concise specification of the errors complained of, and a statement of the relief sought.

§ 29-1.350 Buying in.

"Buying in" refers to the practice, in some procurements involving price competition, of a contractor's attempting to obtain a contract award by knowingly offering a price lower than the contractor's anticipated cost of performance. The usual motive is the expectation by the contractor of either (a) increasing the contract price during the period of performance through change orders or other means, or (b) receiving future "follow-on" contracts at prices high enough to recover any losses on the original "buy-in" contract. It occurs sometimes in response to requests for proposals for cost reimbursement type contracts. While the contractor's deliberately understating anticipated costs may not, in itself, result in a contract award, nevertheless it can exert a favorable influence toward that contractor's selection. Such a practice is not illegal. However, it should not be encouraged since any apparent savings offered are frequently illusory, especially where its long term effect may diminish competition or where it may lead to poor contract performance resulting from the stinting use of the contractor's re-

sources in the contractor's attempting to minimize losses resulting from the award. Where there is reason to believe that "buying in" has occurred, contracting officers shall assure that amounts thereby excluded in the contractor's development of the original contract price are not recovered in the pricing of change orders or in follow-on procurements subject to cost analysis. In cases of suspected "buying in," the contracting officer shall attempt to eliminate the contractor's motive for "buying in." Failing that, the contracting officer shall substantially reduce the contractor's benefit from the practice. Some techniques for neutralizing a contractor's benefit from "buying in" include: analyzing future needs for recurring items to determine if either the techniques of "multiyear procurement" or the inclusion within the contract of priced options for the purchase by the Government of additional quantities is warranted; pricing out with extreme care any change orders or any noncompetitive procurement for additional quantities from the same contractor; attempting to continue competition for new quantities of the same item; insuring that direct costs incurred by the contractor are not subsequently borne indirectly in the form of overhead or other indirect costs; and initially negotiating the specification and details of the contractor's performance as specifically as possible.

[36 FR 3054, Feb. 17, 1971, as amended at 42 FR 40198, Aug. 9, 1977]

§ 29-1.351 Refunds from contractors.

(a) *General.* A refund is a payment or credit, not required by any contractual or other legal obligation, made to the Government by a contractor or subcontractor. A refund is processed either as a separate payment or as an adjustment under one or more contracts or subcontracts. Refunds can be made wholly at the initiative of the contractor or solicited by the Department. The refund could arise during or after contract performance. It could be based on compensating the Government for: An overcharge to the Government; failure by the contractor or subcontractor to adequately compensate the Government for the use of Government-owned property; proceeds from the disposition of contractor inventory; or otherwise, where retention of the money by the contractor or subcontractor would be contrary to good conscience and equity. Prior to the solicitation of a refund or the acceptance of a voluntary refund initiated by the contractor, the head of the procuring activity responsible for administering the contract shall first obtain the advice of the Solicitor to determine whether the Government's rights would be jeopardized or impaired by the contracting officer's proposed action.

(b) *Disposition of refunds.* (1) If a refund is offered prior to final payment, it is preferable that the contract price be appropriately modified to reflect the refund. In such a case, the amount of the refund shall be credited to the applicable appropriation cited in the contract.

(2) In cases where the refund is to be made by check separate from, rather than by an adjustment in, the contract price, the check shall be made payable to the Department of Labor and shall be forwarded immediately to the disbursing office, the address of which shall be supplied by the contracting officer responsible for administering the contract. When forwarded, the check shall be accompanied by a letter from the contractor identifying it as a voluntary refund, giving the number of the contract or contracts involved and, where possible, giving the account number of the appropriation to which the refund should be credited.

§ 29-1.352 [Reserved]

§ 29-1.353 Standards of conduct.

All DOL personnel engaged in activities related to procurement shall conduct such activities in a manner above reproach in every respect. See Part 0 of Title 29 CFR. Transactions relating to expenditure of public funds require the highest degree of public trust to protect the interests of the Government. See § 29-1.302 for requirements concerning "arms-length" dealings.

§ 29-1.354 Violations of law.

In the event DOL procurement personnel have reason to believe there is

evidence of a violation of law of any nature whatsoever in bids or proposals received, including a violation of the antitrust laws, they shall prepare, for the signature of the head of the procuring activity, a complete report addressed to the Solicitor. In the case of a possible violation of antitrust laws, a report from procurement personnel through the same channels shall be prepared for the Attorney General, complying with the requirements of Subpart 1-1.9 of this title.

Subpart 29-1.4—Procurement Responsibility and Authority

§ 29-1.400 Scope of subpart.

This subpart deals with the procurement responsibility and authority of the head of the agency as defined in § 29-1.204, and also the head of the procuring activity and contracting officer, the selection of the latter, their designation and the degree and manner with which procurement authority is delegated to them and their right of redelegation.

[38 FR 15964, June 19, 1973]

§ 29-1.401 Responsibility of the head of the procuring activity.

(a) *First tier delegation.* In the DOL, contracting officer and grant officer authority and procurement responsibility have been delegated from the Secretary of Labor through the Assistant Secretary for Administration and Management to the following officials or officers acting in their behalf:

(1) The Assistant Secretary for Employment and Training.

(2) The Assistant Secretary for Occupational Safety and Health

(3) The Assistant Secretary for Employment Standards.

(4) The Deputy Under Secretary for International Affairs.

(5) The Commissioner of Labor Statistics.

(6) The Regional Administrators—Office of the Assistant Secretary for Administration and Management (OASAM).

(7) The Director, Administrative Programs and Services, OASAM.

(b) *Delegations and limitations.* Except for the restriction set forth in § 29-1.401 (c)(5)(ii), the delegations noted in paragraph (a) of this section may be further redelegated within limitations by these officers within their respective areas of assigned responsibility. However, prior to such redelegations, contracting officers should consider the following factors to determine the extent to which authority should be redelegated: Volume of procurement programs; presence of, or capability of obtaining adequately trained personnel; consolidation of smaller procurement programs and offices on a geographical basis; and the overall strengthening of the procurement process by the selection of qualified personnel. In accordance with § 29-1.404-2, copies of every further redelegation must be furnished to the Assistant Secretary for Administration and Management, Attention: ABA.

(c) *Responsibilities.* The responsibilities of the delegations above are described as follows:

(1) *The Assistant Secretary for Employment and Training,* or an officer acting in that capacity, is assigned the responsibility for procurement and the issuance of grants for program property and services, except as otherwise delegated under paragraph (c)(7) fo this section, required to fulfill the statutory and regulatory responsibilities imposed on the Assistant Secretary for Employment and Training.

(2) *The Assistant Secretary for Occupational Safety and Health,* or an officer acting in that capacity, is assigned the following responsibilities:

(i) Reimbursement to States, pursuant to section 7(c)(1) of the Occupational Safety and Health Act of 1970, as amended (Pub. L. 91-596, 84 Stat. 1590), for services, facilities, and personnel of the States used to carry out the statutory and regulatory responsibilities imposed on the Assistant Secretary for Occupational Safety and Health.

(ii) Reimbursement to States, pursuant to section 7(c)(1) of the Occupational Safety and Health Act of 1970, as amended (Pub. L. 91-596, 84 Stat. 1590), for services facilities, and personnel of the States used to carry out the statutory and regulatory responsibilities imposed on the Assistant Sec-

retary for Occupational Safety and Health.

(iii) Issuance of grants, pursuant to section 21(b) of the Act, for the conduct of short-term training of personnel.

(3) *The Assistant Secretary for Employment Standards,* or an officer acting in that capacity, is assigned the responsibility for medical supplies and services required under the Federal Coal Mine Health and Safety Act of 1969, as amended (Pub. L. 91-173, 84 Stat. 742).

(4) *The Deputy Under Secretary for International Affairs,* or an officer acting in that capacity, is assigned the responsibility for procurement of supplies and services, except as otherwise delegated under paragraph (c)(7) of this section, required for economic research services in support of foreign economic and trade policy formulation: training and orientation of foreign nationals; and overseas exhibitions required to fulfill the statutory and regulatory responsibilities imposed on the Deputy Under Secretary for International Affairs.

(5) *The Commissioner of Labor Statistics,* or an officer acting in that capacity, is assigned the following responsibilities:

(i) Procurement of statistical and economics research services, including grants, except for those delegated under paragraph (c)(7) of this section, required to fulfill the statutory and regulatory responsibilities imposed on the Commissioner of Labor Statistics.

(ii) Procurement needed for operation of the National Office of the Bureau of Labor Statistics: (A) Using FEDSTRIP for General Services Administration (GSA) common cataloged and supplied office furnishings, equipment, and supplies; (B) using GSA Federal Supply Schedule contracts for all items except automatic data processing (ADP) hardware and software, office copiers, and ADP communication devices; and (C) using the imprest fund for small purchase items in accordance with § 29-3.604. This authority may be redelegated only to officials in the National Office.

(iii) Sale of special statistics developed by the Bureau of Labor Statistics in accordance with the Act of April 13, 1934 (29 U.S.C., 9 (1970)).

(6) *The Regional Administrators—OASAM,* or officers acting in that capacity, are assigned the following responsibilities within their respective regions:

(i) Procurement of property and services required for the regional offices, including all imprest fund purchases and GSA Federal Supply Schedule purchases. Purchases of office machines, e.g., typewriters, adding machines, and calculators, must be written against blanket purchase orders maintained for such equipment by the Director, Administrative Programs and Services, OASAM.

(ii) Procurement of all automatic data processing (ADP) hardware and software for the regional offices, with prior approval from the Director, Office of Grants, Procurement and ADP Management Policy.

(7) *The Director Administrative Programs and Services, OASAM,* or and officer acting in that capacity, is assigned the following responsibilities:

(i) Procurement of all property and srvices required for the operation of the DOL, and program-related property and services not specifically delegated to other officials in paragraphs (c)(1), (2), (3), (4), (5), and (6) fo this section.

(ii) Procurement of all supplies and services, including program-related, through the imprest fund and from GSA Federal Supply Schedules required for the DOL National Office, except for authority delegated in § 29.1.401(c)(5); and the purchases of advertising required for the DOL National Office.

(iii) Procurement of all automatic data processing (ADP) hardware and software for the DOL National Office, only with prior approval from the Director, Office of Grants, Procurement and ADP Management Policy, OASAM.

(8) *The Director Office of Grants, Procurement and ADP Management Policy, OASAM,* or an officer acting in that capacity, is assigned the following responsibilities:

(i) Developing and publishing departmentwide procurement and grant regulations, guidelines, and policies.

(ii) Reviewing and evaluating administrative adequacy of the Department's procurement and grant operations.

(iii) Providing technical advice and assistance to those DOL officials and officers delegated procurement and grant responsibilities. This includes interpreting the Federal Procurement Regulations as they apply to the Department's procurement operations, and obtaining the advice of the Solicitor as required.

[42 FR 40198, Aug. 9, 1977]

§ 29-1.402 Authority of contracting officers.

Contracting officers, in the DOL, within the limits of their contracting officer delegation; have the responsibility and the authority for:

(a) Executing and administering contracts in such a manner as to safeguard the interest of the United States in contractual relationships and making necessary determinations and findings under contracts;

(b) Providing the contractor written notice as provided in § 29-1.450 of the name of the contracting officer's representative or any "on-site" or other technical representative either designated to provide technical surveillance of the work being performed at a particular site or any other service in behalf of the contracting officer and the extent of such representative's authority.

(c) Using standard contract forms, when required by the FPR and DOLPR;

(d) Obtaining all necessary approvals and otherwise complying with applicable contracting directives;

(e) Personally signing all contracts and modifications entered into by them in accordance with § 29-1.303;

(f) Exercising care, skill, and judgment in all of their actions;

(g) Assuring that funds are available and that their actions are within the scope of their authority;

(h) Maintaining necessary review with respect to contract performance on the part of the contractor;

(i) Securing where required, the advice of legal, technical, and administrative staffs of DOL as to the sufficiency of contracts prior to their execution;

(j) Initiating any appropriate action necessary to properly assure satisfactory contract performance.

[36 FR 3054, Feb. 17, 1971, as amended at 42 FR 40199, Aug. 9, 1977]

§ 29-1.404 Selection, designation, and termination of designation of contracting officers.

§ 29-1.404-1 Selection.

All selections of individuals shall be made with care and on the basis of criteria set out in § 1-1.404-1 of this title.

§ 29-1.404-2 Designation.

All designations and terminations of designations of contracting officers shall be made in writing with two copies forwarded to the Assistant Secretary for Administration and Management, who shall maintain a file of all employees currently designated to act as contracting officers and of the instruments of their designation.

§ 29-1.404-50 Modification of authority.

To effect modification of a contracting officer's authority, a new designation (appointment) shall be issued revoking the present appointment.

[42 FR 40199, Aug. 9, 1977]

§ 29-1.404-51 Continuity of responsibility.

Designated contracting officers who relieve or succeed previously designated contracting officers will assume responsibility for the administration of contracts entered into by the previously designated contracting officers. Each contracting officer succession requires a new written designation.

§ 29-1.405 Ratification of unauthorized contract awards.

Except in compliance with the ratification limitation of § 1-1.405 of this title, no liability shall be incurred by the Government as a result of any individual's entry into any informal or unauthorized arrangement for the reimbursement of a contractor's precon-

tract or anticipatory costs, even if such costs were incurred by the contractor while "proceeding at the contractor's own risk," until the occurring of some contingency, e.g., "subject to the availability of funds."

[38 FR 15964, June 19, 1973]

§ 29–1.450 Contracting officers representatives.

(a) Contracting officers may designate other Government employees to act as their authorized representatives for certain specific purposes of contract administration. Such designation shall be in writing and shall contain specific instructions as to the extent to which the representative has been delegated authority to take action for the contracting officer. Such designation shall not contain authority to sign contractual documents. Such designation may include authority for the review and approval of all or some of the following: The preliminary approach to contract performance, a research plan, research techniques, progress reports, invoices, and final reports, and/or other functions of a technical nature not involving a change in the scope, price, terms, or conditions of the contract or order. The designation of the contracting officer's representative and the responsibilities delegated to that official shall be made known to the contractor, in writing, as set forth in paragraph (c) of this section, preferably by including it in the contract at time of award. However, if the designation is not known at the time of award, it should be included, when known, in the contract by amendment. Letter notice, while permissible, is nevertheless not as desirable as notice that becomes part of the contract.

(b) A person assigned to a procurement office and performing primary duties in a position within a procurement office, and under the supervision of a contracting officer, does not require written designation as a representative of the contracting officer nor designation in a contractual document to perform assigned duties. Such a person is considered to be an employee of the contracting officer, acting in the latter's behalf and, as such, has the authority and responsibility to perform, under the terms and conditions of employment, and to act as assigned by the contracting officer. The contracting officer, however, shall not authorize such an employee, acting as a representative fo the contracting officer, to sign any contractual document or letter in those instances where the signature of a contracting officer is required.

(c) The contracting officer shall use a contract clause substantially similar to the one below to make known his designation of a representative and shall include in such designation authority to perform those administrative actions in (b) of the clause as may be applicable.

IDENTITY AND AUTHORITY OF THE CONTRACTING OFFICER'S REPRESENTATIVE

(a) The authorized representative of the contracting officer is ————————, whose authority to act on behalf of the contracting officer is limited to the extent set forth in (b) below. Under no circumstances is ———————————— authorized to sign any contractual documents or approve any alteration to the contract involving a change in the scope, price, terms or conditions of the contract or order.

(b) ———————————— is authorized to review and approve:

(1) Preliminary approaches in the work scope.

(2) The research plan in a research, development or evaluation contract.

(3) Research techniques.

(4) Progress reports.

(5) Invoices.

(6) Final reports.

[36 FR 3054, Feb. 17, 1971, as amended at 42 FR 40199, Aug. 9, 1977]

§ 29–1.451 [Reserved]

§ 29–1.452 Responsibility of procurement officials to question requirements and reaffirm their validity.

Procurement officials are responsible for questioning the need for and the validity of any contemplated procurement action particularly under any of the circumstances described below:

(a) Where requisitions for unusually large quantities of an item or requisitions for untimely or otherwise unusual purchases are received immediately prior to the end of the fiscal year in

which the funds may be obligated ("June Buying").

(b) Where the request for procurement of goods and services requires development by the supplier of a special item when suitable off-the-shelf items are available.

(c) Where the specification furnished by the using activity appears to be either more or less restrictive than necessary to assure satisfactory performance for the purpose for which the item is being procured.

(d) Where sufficient quality-assurance offered by the supplier's data appears to be lacking.

(e) Where award on a proposed procurement has been prolonged to the extent of raising a question as to its ultimate need.

(f) Where during the processing of the procurement the description of the supplies or services or the delivery schedule or quantity continue to undergo change or matters are otherwise disclosed which raise a question as to the necessity for the requirement or, at least, its magnitude, in the form being procured.

(g) Where the procurement appears to delegate, to contractors and others, any of those decision-making responsibilities or prerogatives of the Government that are improper to delegate from the standpoint of "public policy."

(h) Where the procurement may result in unnecessarily isolating the supplier from future competition, thus creating an expensive, restrictive dependency on that supplier to fill future needs.

(i) Where the benefits accruing to the contractor as a result of the contract are so large that the contractor should be required to share costs and/or make other concessions to the Government.

(j) Where proposals or bids for performing the work required in the procurement appear to be solicited from an unreasonably small number of suppliers.

(k) Where the Government does not reserve the royalty-free right to publish or have published the publications and reports which are the deliverable end products of the procurement.

(l) Where the procurement would place the contractor's employees under the direct supervision and control of DOL officials and employees.

(m) Where there appears to be inadequate security to safeguard Government funds or property.

(n) Where the procurement provides no description or definition of what constitutes satisfactory performance on the part of the contractor.

(o) Where the scope of the contractor's performance includes not only research performance but evaluation of that research performance. This type of contract has as its basic characteristic a combination of functions that inherently makes for a conflict of interests, e.g., when a feasibility study is combined with performance, or performance is combined with performance evaluation, as part of the same effort.

(p) Where the procurement otherwise appears to violate statutes, regulations, or the Department's policies and procedures.

[36 FR 3054, Feb. 17, 1971, as amended at 42 FR 40199, Aug. 9, 1977]

§ 29-1.453 Independence of procurement officials to carry out responsibilities.

The heads of the procuring activities shall take necessary measures to insure the independence of the judgment of contracting officers. This includes the provision of a suitable location within the procuring activity so that contracting officers can fulfill objectively the responsibilities set out in § 29-1.402. In this connection, it is the policy of DOL to place procurement officials to the maximum practical extent outside the direct supervision of program operating officials.

[36 FR 3054, Feb. 17, 1971. Redesignated at 42 FR 40198, Aug. 9, 1977]

Subpart 29-1.5—Contingent Fees

§ 29-1.508 Enforcement.

§ 29-1.508-1 Failure or refusal to furnish representation and agreement.

In all cases of negotiated procurement where the SF 119 is required, the contracting officer shall determine

whether negotiations will be suspended pending receipt of the executed SF 119.

§ 29-1.508-2 Failure or refusal to furnish Standard Form 119.

The contracting officer may take any of the actions authorized in § 1-1.508-2 of this title provided that the contract file is documented to justify the action taken.

[42 FR 40199, Aug. 9, 1977]

§ 29-1.508-3 Misrepresentations or violations of the covenant against contingent fees.

(a) The head of a procuring activity, only with the advice and consent of the Solicitor first obtained, can take any of the actions authorized by § 1-1.508-3(a), (b), and (c) of this title.

(b) The Solicitor will make the determination required by § 1-1.508-3(d) of this title.

Subpart 29-1.6—Debarred, Suspended, and Ineligible Bidders

§ 29-1.600 Scope of subpart.

This subpart prescribes policies and procedures concerning the establishment, maintenance and use of a list of debarred, suspended, and ineligible bidders and contractors.

§ 29-1.601 General.

§ 29-1.601-1 Definitions.

"Debarring Officer" means the Assistant Secretary for Administration and Management who is the DOL official authorized to invoke debarment or suspension measures as authorized by § 1-1.602-1 (d), (f), and (g) of this title, and to include on the "DOL Debarred, Suspended, and Ineligible Bidders' List," defined in this subpart, those concerns and individuals determined to be subject to such measures in accordance with § 1-1.602-1 (a), (b), (c), and (e) of this title.

[42 FR 40199, Aug. 9, 1977]

§ 29-1.602 Establishment and maintenance of a list of concerns or individuals debarred, suspended, or declared ineligible.

The Debarring Officer shall establish and maintain a list of concerns and individuals to whom contracts will not be awarded and from whom bids or proposals will not be solicited for contracts with the DOL. The list shall be designated as the "DOL Debarred, Suspended, and Ineligible Bidders' List" and compliance with its use throughout DOL is mandatory. The Debarring Officer shall keep the list current and publish and distribute it bi-monthly to heads of DOL procuring activities who shall be responsible for its redistribution. The list shall be marked "For Official Use Only" to reduce inspection of its contents by other than DOL personnel required to have access thereto. The head of an Agency may request, in writing, that a concern or individual be placed on the "DOL Debarred, Suspended, and Ineligible Bidders' List" in accordance with procedures of this subpart. This official may initiate the request personally, or may do so by endorsing the recommendation of the responsible Agency contracting officer. If all necessary information is not readily available, a preliminary report concerning actions that may warrant debarment may be submitted, to be followed as soon thereafter as practicable by a completely documented report. The Debarring Officer, based on the preliminary report, may determine that a suspension is warranted. The Debarring Officer will also be responsible for making for DOL, the determinations, administrative and otherwise, which are permitted under § 1-1.602-1 (d), (f), and (g), and § 1-1.604 of this title and for maintaining liaison with the General Services Administration and otherwise complying with § 1-1.606 of this title. Upon a showing by the head of an Agency that it would be in the public's best interest to make an exception for a particular procurement action and allow an award to a debarred concern or individual, the Debarring Officer may determine that an exception is warranted.

[42 FR 40199, Aug. 9, 1977]

§ 29-1.604 **Causes and conditions applicable to determination of debarment by an executive agency.**

§ 29-1.604-1 **Procedural requirements relating to the imposition of debarment.**

(a) *Initiation of debarment action.* The Debarring Officer shall determine whether the request for debarment has sufficient merit to warrant further processing. He shall communicate the decision to the head of the Agency recommending debarment.

(1) *Notice to contractors.* If the Debarring Officer decides further action in the matter is warranted, this official shall send a letter by registered mail, return receipt requested, to notify the concern or individual that debarment is being proposed, stating, as a minimum, in addition to the items required in § 1-1.604-1 of this title, the following:

(i) The scope of the proposed debarment as to any known affiliates, if any;

(ii) The period of the proposed debarment;

(iii) The extent of the proposed debarment, e.g., whether it is Department-wide;

(iv) That the debarment determination shall become final and effective 30 days after receipt by the concern or individual of such letter, unless the concern or individual mails or otherwise furnishes written information to show why there should not be a decision to debar or furnishes to the Debarring Officer a written request for hearing addressed to the Secretary of Labor in accordance with § 29-60, prior to the scheduled effective date.

(v) Whether the concern or individual is temporarily suspended pending the disposition made of the proposed debarment.

(2) *Contractor response to notice.* The following shall apply with regard to the response of the concern or individual in question:

(i) *No reply received.* When no reply is received to the notice of proposed debarment within the time limit stated in the notification, the case shall be decided on the information available, i.e., without a hearing.

(ii) *Reply received.* Where written information is received, but no hearing requested, such written information shall be taken into consideration in the final determination of the case by the Debarring Officer.

(iii) *Reply received and hearing requested.* When a hearing is requested, the Debarring Officer shall forward the request for hearing to the Secretary of Labor.

[36 FR 3054, Feb. 17, 1971, as amended at 42 FR 40199, Aug. 9, 1977]

Subpart 29-1.7—Small Business and Small Disadvantaged Business Concerns

SOURCE: 47 FR 11375, Mar. 16, 1982, unless otherwise noted.

§ 29-1.700 General.

This subpart sets forth the responsibilities and policies for implementing a Small Business and Small Disadvantaged Business Program, including small women-owned business, within the Department of Labor.

§ 29-1.701 Definitions.

(a) The term "small business concern" shall mean a small business as defined pursuant to section 3 of the Small Business Act, as amended (15 U.S.C. 632), and relevant regulations promulgated pursuant thereto (13 CFR Part 121-3-8 and 41 CFR (FPR) 1-1.701-1).

(b) The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern:

(1) Which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals, or in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

(2) Whose management and daily business operations are controlled by one or more of such individuals.

(c) The term "socially disadvantaged individuals" shall mean those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group

without regard to their individual qualities.

(d) The term "economically disadvantaged individuals" shall mean those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

(e) The term "socially and economically disadvantaged business groups" shall include but is not limited to, Black Americans, Hispanic Americans, Native Americans and Asian-Pacific Americans. The term "Native Americans" shall mean American Indians, Eskimos, Aleuts and native Hawaiians. The term "Asian-Pacific Americans" shall mean U.S. citizens whose origins are from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, or Taiwan.

(f) Other individuals may qualify as socially and economically disadvantaged under procedures which have been separately established by the Small Business Administration at 13 CFR 124.1-1(c)(3)(iv).

(g) The term "DOL" shall mean the U.S. Department of Labor.

(h) The term "OSDBU" shall mean the DOL Office of Small and Disadvantaged Business Utilization.

(i) The term "SDBS" shall mean the small and disadvantaged business specialist within individual DOL procuring activities.

§ 29-1.702-50 General policy.

The Department of Labor (DOL) fully supports the Government's small business and small disadvantaged business program for placing a fair proportion of its private sector purchases and contracts for supplies, research and development, and services (including contracts for maintenance, repairs, and construction) with small business and small disadvantaged business concerns. Every effort should be made to encourage participation by such concerns in the acquisition of equipment, supplies, and services that are within their capabilities.

§ 29-1.704 Agency program direction and operation.

§ 29-1.704-1 DOL headquarters.

(a) The Office of Small and Disadvantaged Business Utilization (OSDBU), Office of the Under Secretary, is responsible for the overall management and direction of the DOL Small Business and Small Disadvantaged Business Program. Any changes made in the program will originate in and be the responsibility of this office. All comments or inquiries concerning the program should be directed to the Director, OSDBU.

(b) The responsibilities of the Director, OSDBU, include, but are not limited to, developing standards, procedures and operating guidelines for effective administration of the program; developing, in coordination with agency heads and the Small Business Administration (SBA), departmental goals; reviewing and evaluating agency objectives, procedures, and accomplishments, and recommending changes or corrective actions where appropriate; exercising functional authority over SDBS in matters relating to small business and small disadvantaged business; advising the Under Secretary and other DOL officials on matters relating to the program; and representing DOL before other Government agencies on matters primarily affecting small business and small disadvantaged bu iness concerns.

§ 29-1.704-2 DOL Agency heads.

Each Agency head within the Department of Labor is responsible for insuring that all policies, procedures, and regulations pertaining to the Department's small business and small disadvantaged business program are effectively implemented at all operational levels under his/her jurisdiction. Each Agency head shall develop annual advance procurement plans in order to establish aggressive small business and small disadvantaged business goals. Such plans shall be incorporated into and reconciled with the final annual advance procurement plan which is to be submitted to the Department's Office of the Comptroller by October 1 of each fiscal year.

§ 29-1.704-3 DOL procuring activities.

(a) The head of each DOL procuring activity, including regional officials, is responsible for the effective implementation and success of the Department's small business and small disadvantaged business program within his/her respective activity. Such individual shall take action to assure that program personnel, as well as contracting personnel, take maximum practicable action to increase the level of participation by small business and small disadvantaged business concerns in DOL procurement activities.

(b) Each head of procuring activities shall, in consultation with the Director, OSDBU, appoint by name and in writing, a qualified, senior level, small and disadvantaged business specialist (SDBS). While SDBS will normally be appointed from members of operating staffs, he/she shall be directly responsible to the appointing official in matters relating to small business and small disadvantaged business concerns and shall not be subject to the direction of his/her immediate line of procurement supervision or technical personnnel. The SDBS is not precluded from being assigned responsibility for the Labor Surplus Area Program or the Minority Business Enterprise Program as prescribed by FPR Subparts 1-1.8 and 1-1.13 respectively. The Office of Small and Disadvantaged Business Utilization shall be notified, in writing, of each appointment.

§ 29-1.704-4 Small and disadvantaged business specialists.

The small and disadvantaged business specialist (SDBS) shall serve as advisor to the head of his/her respective activity, and shall be the central point of contact for inquiries pertaining to the small business and small disadvantaged business program. The SDBS shall perform the following specific duties, as well as perform any additional functions as prescribed in the furtherance of the OSDBU program:

(a) Assist contracting and technical personnel in determining requirements which may be suitable for small business and small disadvantaged business set asides, to afford such firms an equitable opportunity to participate in the Department's procurement activities;

(b) Initiate action, in writing, to assure that adequate specifications are drawn, wherever possible, so as not to preclude participation by small business;

(c) Advise and assist small business in the proper procedure for participating in Government procurements;

(d) Assure that the subcontracting clause entitled "Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals" as prescribed by the Temporary Regulation 50, Supplement 2, (45 FR 35809, May 28, 1980), is included in applicable solicitations;

(e) Participate in the evaluation of a prime contractor's small business subcontracting plan;

(f) Provide, upon request, small disadvantaged business concerns with a source list of firms solicited for any proposed procurements which contains the subcontracting clause entitled "Utilization of Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals";

(g) Assure that the procuring activity maintains a list of products and services which have been placed as repetitive small business set-asides; and

(h) Act as liaison between his procurement office, the contracting officer, and the appropriate SBA office is connection with Set-asides, certificates of competency, size classification, and any other matter in which the small business programs may be involved.

§ 29-1.704-5 Responsibilities of the procurement office.

(a) Each DOL procurement offfice shall take positive action to identify equipments, products and services where a potential exists for increasing the small and disadvantaged business concern's share of contract awards. Each procurement office shall, to the maximum extent feasible, arrange for the making of unilateral small business set asides on all contracting action which qualify. The procurement office shall take appropriate action to provide maximum advance

and current information, assistance, and counseling of such nature and extent as to enable small business concerns to take full advantage of available DOL business opportunities and to compete for contracts.

(b) In accordance with FPR 1-2.205, each procurement office shall maintain bidders mailing lists. Each office shall insure that bidder's mailing lists identify small and disadvantaged business concerns and that all solicitations state the applicable small business size standard and product classification.

§ 29-1.704-50 Reports.

The Director, OSDBU is required from time to time to inform the Congress, Small Business Administration, General Services Administration, and Department of Commerce of the Department's activities undertaken to comply with laws and regulations concerning the Federal small business and small disadvantaged business programs. Such reports include annual goals, progress reports, minority banking reports and other data as requested. Therefore, each DOL Agency must submit to OSDBU, as directed by the Director, OSDBU, annual procurement goals for each of the Department's small business and small disadvantaged business programs, quarterly reports concerning actual procurement actions and dollar values of awards for each of the small business and small disadvantaged business programs, quarterly minority banking reports, and any other report required by that office.

§ 29-1.706-50 Procurement set-asides for small business when an SBA representative is not available.

If no SBA representative is available, the SDBS shall initiate recommendations to the contracting officer for small business set-asides with respect to individual procurements or classes of procurements or portions thereof. The SDBS's set-aside recommendations shall be in writing and shall state the reasons for the type of set-aside recommended or the reasons for recommending against a set-aside. The recommendation ultimately shall be placed in the contract file.

§ 29-1.706-51 Small business set-asides for proposed procurements.

(a) All procurements under $10,000, awarded through small purchase procedures (except for mandatory services), shall be set aside for small business concerns when the contracting officer can expect to receive two or more offers from small business concerns who are competitive in market prices and in terms of quality and delivery of items being purchased.

(b) Each proposed procurement for construction estimated to cost between $10,000 and $2 million shall be set aside for exclusive small business participation. Such set-asides shall be considered to be unilateral small business set-asides, and shall be withdrawn, in accordance with the procedures of FPR 1-1.706-3 and DOLPR 29-1.706-3, only if found not to serve the best interest of the Government.

(c) Small business set-aside preferences for construction procurements in excess of $2 million shall be considered on a case-by-case basis.

(d) In addition to paragraphs (a) and (b) of this section, contracting officers are authorized to seek set-asides for all susceptible procurements including architectural engineering, research, development, and evaluation.

§ 29-1.708 Certificate of competency program.

The Small Business Administration has statutory authority (15 U.S.C. 637(b)(7)(A)) to certify the competency of any small business concern as to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity to receive and perform a specific Government contract.

§ 29-1.710 Subcontracting with small business and small disadvantaged business concerns.

§ 29-1.710-1 General.

(a) It is the Department of Labor's policy to support the Government's effort to enable small business concerns and small disadvantaged business concerns to be treated fairly as subcontractors performing work or

rendering services to prime contractors or subcontractors under DOL contracts, and to assure that prime contractors and subcontractors carry out this policy.

(b) Procuring activities shall maintain lists of active prime contracts containing the clause entitled "Subcontracting Plan for Small Business and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals."

(c) The OSDBU shall review all solicitations that meet the $500,000 threshold prior to release to the public. In addition, prior to execution of any negotiated contractual document requiring subcontracting plan, the OSDBU shall be provided an opportunity to review the total procurement package, including the proposed subcontracting plan.

§ 29-1.713 Contracts with Small Business Administration.

§ 29-1.713-1 Authority.

This section sets forth provisions for contracting with the Small Business Administrationunder Section 8(a) of the Small Business Act (15 U.S.C. 637(a)). The "Section 8(a)" contract program is a socio-economic, Congressionally-mandated and Presidentially-sponsored program aimed at opening the doors of Government contracting opportunities to small disadvantaged businesses unable or unlikely to compete successfully for a contract.

§ 29-1.713-2 Policy.

(a) It is the policy of DOL to give full consideration to contracting with SBA in order to foster and assist in the establishment and growth of Section 8(a) firms to the maximum extent practicable so that these firms may be self-sustaining, viable, competitive business entities within a reasonable period of time.

(b) To promote the policy in paragraph (a) of this section, DOL procurement activities are to enter into contracts with the Small Business Administration (SBA), and SBA may subcontract with Section 8(a) firms. The authority to negotiate these subcontracts may be delegated to DOL by SBA. In addition, DOL procurement activities shall take the necessary steps to:

(1) Invite appropriate SBA field representatives to identify needs for Section 8(a) contracts and to provide for cooperation and assistance on the part of DOL in verifying the availability or nonavailability of requirements, funding, and other pertinent factors; and

(2) Propose any requirement which appear to offer potential opportunity for contracting with SBA under authority of Section 8(a) of the Small Business Act, for consideration by approporiate SBA field representatives.

(c) The basis for entering into a Section 8(a) contract will be SBA's certification to DOL that SBA, through the Section 8(a) firm, is competent to perform a specific DOL requirement. The signing of the contract document may be accepted as SBA's certification.

(d) As is true of small businesses in general, Section 8(a) firms have varying degrees of experience in the business world, and some may not have knowledge of the complexity of Government procedures and of obligations the procedures impose on the contractor. Prior to initiating formal negotiations with a Section 8(a) firm, contracting personnel and small disadvantaged business specialists should make a special effort to ascertain whether the prospective contractor needs assistance in understanding Government procurement procedures. Whenever possible, assistance should be provided promptly, and the prospective contractor should be advised that additional management and technical assistance is available from the Small Business Administration.

§ 29-1.713-50 Procurement of technical requirements.

(a) *Source selection.* The Section 8(a) program is a business development program, and the policy expressed in FPR 1-3.101(d) does not apply. Additionally, SBA has ultimate responsibility for nomination of a Section 8(a) subcontractor for a proposed Section 8(a) requirement and may elect to deviate from the usual source nomination procedures.

(b) *Debriefing.* A debriefing, when requested in writing, shall be provided

by the contracting officer to a Section 8(a) firm that has been unsuccessful in a Section 8(a) competition.

(c) *Liaison with the Small Business Administration.* Procuring activities will maintain a continuous liaison with the Office of Business Development, SBA, to ensure that the overall goals of each activity are achieved. In the event of a dispute between a procuring activity and an SBA representative regarding any aspects of Section 8(a) contracting, the procuring activity must promptly notify the OSDBU.

(1) Each Section 8(a) firm or group of firms nominated for a specific Section 8(a) requirement must be approved by SBA for that particular Section 8(a) requirement prior to any DOL discussions with the firm(s).

(2) The business development responsibility of SBA requires them to assist in and monitor the growth and development of all Section 8(a) firms. It is incumbent upon DOL to assist SBA in this effort by utilizing the nomination process in a manner that would make use of the largest possible number of Section 8(a) firms.

(d) *Contract termination.* The OSDBU and SBA are to be notified prior to initiating final action to terminate a Section 8(a) contract. (See paragraph (c) of the "Special 8(a) Contract Conditions" prescribed as set forth in FPR 1-1.713-3(d)(1).

Subpart 29-1.8—Labor Surplus Area Concerns

§ 29-1.802 Labor surplus area policy.

[47 FR 11378, Mar. 16, 1982]

§ 29-1.802-1 General policy.

It is the policy of the Department of Labor to award contracts with eligible labor-surplus area concerns. All procuring activities shall take positive action to award contracts to concerns that will perform substantially in labor-surplus areas. Each Small and Disadvantaged Business Specialist, assigned in accordance with DOLPR 29-1.704-2, of this part shall serve as liaison officer and shall have responsibility to administer the program within his/her area in accordance with policies and procedures defined in DOLPR 29-1.704-4.

[47 FR 11378, Mar. 16, 1982]

Subpart 29-1.10—Publicizing Procurement Actions

§ 29-1.1001 General policy.

Whenever possible, it is DOL policy to increase competition by publicizing procurements which offer competitive opportunities for prospective prime contractors or subcontractors, resolving all doubts as to whether or not to publicize, in a particular procurement, in favor of publicizing. The requirements of Subpart 1-1.10 of this title and Subpart 29-1.10 shall be interpreted in a manner consistent with this policy.

§ 29-1.1002 Availability of invitations for bids and requests for proposals.

A contracting officer may limit the availability of publicized unclassified invitations for bids and requests for proposals provided that they are made available for perusal at the issuing office and *Provided further,* That the contracting officer:

(a) States in the synopsis or publicizing notice required by § 1-1.1003 of this title that the number of available "bid sets" is limited, what that limited number is, and that the bid sets will be available on a "first-come-first-served" basis;

(b) States in the synopsis whether only written requests for bid sets will be honored or whether they may be requested by phone and providing, if the latter, the name and phone number of the DOL employee to be contacted; and

(c) Makes available a total of 100 bid sets over and above the number mailed initially or a cumulative total of 150 (counting initial mailing) whichever is less, to concerns and individuals on the bidders mailing list or who are otherwise known to be interested (regardless of whether or not the full bidders mailing list is used).

(d) Obtains a deviation as to the number of "bid sets" required in paragraph (c) of this section, from the head of the procuring activity based

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on unreasonableness of the standard in paragraph (c) of this section for the particular procurement.

[36 FR 3054, Feb. 17, 1971, as amended at 42 FR 40200, Aug. 9, 1977]

§ 29-1.1002-50 Other publicity concerning procurements.

Where without cost to the Government, the procuring activity can effect the publication of procurement solicitation information, it is encouraged to do so. Such publication may result from its own initiative or in conjunction with one of the DOL information offices. The solicitation may either be current or proposed, but the publication of such information must be consistent with § 1-1. 1003-1(b) of this title. The publication of other information, however, shall not relieve a procuring activity from the requirement for compliance with §§ 1-1.1003-1, 1-2.202-3(b) and 29-2.203 of this title. Paid advertisements may only be used as provided in § 29-2.203-3.

Subpart 29-1.12—Responsible Prospective Contractors

§ 29-1.1202 General policy.

(a) A contracting officer's duty to contract only with a responsible contractor does not preclude that official's disclosing to the contractor those actions the contractor might take to become "responsible" within the meaning of §§ 1-1.203-1 and 1-1203-2 of this title. The contracting officer should consider the use of DOL staff in order to qualify a contractor as responsible only when such assistance is within the spirit of the Small Business Administration's program objectives; or is the only way a marginal organization, for which there is no substitute in a given geographic area, can be made eligible, such as in a program for the disadvantaged.

(b) Such DOL staff assistance can take many forms. In cases of borderline financial responsibility, the contracting officer should encourage the contractor's use of available financing techniques. These include, but are not limited to, performance guarantees, advance payments, or Small Business Administration loans. In cases where either the inadequacy of a contractor's accounting system or the contractor's inability to conformt to the contractor's inability to conform to the requirements of the Equal Opportunity Clause is a barrier to the award of a contract, the contracting officer should consider, on a case-by-case basis, the practicality of arranging for assistance to the contractor. Such assistance may take the form of either staff assistance may take the form of either staff assistance from the Department or, in instances of an equal opportunity problem, the assistance of the applicable compliance agency. In this manner, the services of specialists could be made available to the contractor, when appropriate, to overcome the obstacle to award.

(c) Nothing herein, however, shall be construced, directly or indirectly, as placing on the contracting officer the burden of always finding a contractor "responsible" or, alternatively, initiating and pursuing a course of action which with the help of the Department's staff, will lead to a finding of responsibility. Rather, only where the situation warrants it, is it the policy of DOL to encourage positive involvement of a contracting officer in assisting a contractor to become responsible. Where the circumstances clearly warrant a finding of nonresponsibility and also indicate the impracticality of the DOL's attempting to take steps to cure the contractor's deficiencies, it is the policy of the DOL that the contracting officer make a finding of nonresponsibility.

[42 FR 40200, Aug. 9, 1977]

Subpart 29-1.13—Minority Business Enterprise

SOURCE: 47 FR 11378, Mar. 16, 1982, unless otherwise noted.

§ 29-1.1300 Scope of subpart.

This subpart prescribes Department of Labor policies, procedures, and contract clauses which establish a minority business enterprise program pursuant to the provisions of FPR 1-1.13. This subpart is in addition to the policies and procedures for contracts with the Small Business Administration

pursuant to Section 8(a) of the Small Business Act and other small disadvantaged business concerns as prescribed under FPR 1-1.7 and DOLPR 29-1.7 of this part and as otherwise prescribed by law.

§ 29-1.1302 Agency programs.

§ 29-1.1302-50 DOL implementation.

(a) In accordance with provisions of Executive Order 11625, it is the policy of DOL to foster and assist in the establishment and growth of minority-owned and controlled business concerns to the maximum practicable extent, in order that such concerns may become self-sustaining, viable, and competitive enterprises.

(b) The Office of Small and Disadvantaged Business Utilization (OSDBU) is responsible for the general supervision of the Department's minority business enterprise program. This office is specifically responsible for:

(1) Managing the DOL Minority Business Enterprise Program;

(2) Providing staff guidance to activities of the Department;

(3) Establishing effective working relations with the minority business community nationwide;

(4) Representing DOL before other Government agencies on matters primarily affecting minority business affairs;

(5) Providing data and information relating to the minority business program to the Secretary and all sources internal and external to DOL; and

(6) Serving as the Department's monitoring and coordinating point for all matters concerning the Department's minority business enterprise program.

(c) The policies and procedures of DOLPR 29-1.704 are applicable to the minority business enterprise program.

PART 29-2—PROCUREMENT BY FORMAL ADVERTISING

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29-2.407-3 Discounts.
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29-2.407-50 Award when only one bid is received.

AUTHORITY: 63 Stat 389, 80 Stat. 379; 5 U.S.C. 301, 40 U.S.C. 486(c).

SOURCE: 36 FR 3061, Feb. 17, 1971, unless otherwise noted.

NOTE: Nomenclature changes appear at 38 FR 15965, June 19, 1973.

Subpart 29-2.1—Use of Formal Advertising

§ 29-2.101 Meaning of formal advertising.

Formal advertising is both by statute and policy the basic and preferred method of procuring supplies and services. Contracts entered into by DOL shall be made by formal advertising in all cases in which the use of such method is feasible and practical under the existing circumstances. Formal advertising has two basic objectives. One is to gain for the Government the benefits of full and free competition. The other is to afford all qualified sources the same opportunity to bid competitively. Since the procedures of formal advertising are, in general, established by law and regulations, there is seldom, if ever, opportunity for deviation. The contracting officer is responsible for complying with such laws and regulations and for exercising sound judgment with regard to any allowable exceptions consistent with above two basic objectives of formal advertising.

§ 29-2.102 Policy.

Mere lack of time in terms of managerial or operational convenience shall not operate to exclude the use of the formal advertising method for effecting a particular procurement. There must be a compelling urgency for the supplies or services to justify the use of the negotiation exception permitted in section 302(c)(2) of the Federal Property and Administrative Services Act of 1949, as amended. The need for haste in the obligation of annual funds before the end of the fiscal year to avoid the loss of their use does not fall within the statutory exception cited in this § 29-2.102.

§ 29-2.102-50 [Reserved]

§ 29-2.102-51 Specification requirement.

(a) The adequacy of specifications is a critical factor in the use of formal advertising procedures. If the qualitative requirements of the desired item or services are not defined well enough to permit all bidders to bid on the basis of supplying identical items, then the procurement should not have been by formal advertising. Thus, invariably, research and development effort cannot be procured through formal advertising.

(b) Contracting officers are responsible for determining when formal advertising is impractical or otherwise unsuitable. When such a decision is made, it is documented in the form of a determination and finding and processed in accordance with Subpart 29-3.3.

§ 29-2.105 Solicitation for informational or planning purposes.

Formal solicitation of bids and competitive bid procedures shall not be used on an "exploratory" basis for the purpose of testing the market. This does not mean that bids may not be rejected on the basis of an administrative determination that rejection is in the public interest. Where technical data, information on new and improved products, or price and delivery information is required for planning and budgetary purposes, such information shall be solicited in accordance with § 1-1.314 of this title.

Subpart 29-2.2—Solicitation of Bids

§ 29-2.202 Miscellaneous rules for solicitation of bids.

§ 29-2.202-1 Bidding time.

The minimum bidding times set forth in § 1-2.202-1 of this title should not be construed also to be maximum or automatic bidding times. The bidding time permitted under each procurement shall reflect the considered judgment of the contracting officer, taking into account all of the facts surrounding the procurement, with recognition that doubts should be resolved in favor of a longer rather than a shorter bidding time. If the bidding time for any procurement is reduced below the minimum periods of 20 or 30 days, as applicable, the reduction shall be fully justified, approved in writing by the Deputy Assistant Secretary for Administration and Management, and documented in the contract file by the contracting officer.

[36 FR 3061, Feb. 17, 1971, as amended at 42 FR 40201, Aug. 9, 1977]

§ 29-2.202-2 Telegraphic bids.

Unless telegraphic bids are specifically allowed by the invitation, they shall be rejected. The contracting officer may provide for them under the circumstances indicated in § 1-2.202-2 of this title. When such bids are authorized, the schedule of the invitation will contain the following provision:

Telegraphic bids may be submitted in response to this Invitation for Bids. Telegraphic bids must be received in this office prior to the time specified for opening of bids. If you elect to bid by telegraph, your bid shall: Specifically refer to this Invitation for Bids; include the items or subitems, quantities, and unit prices for which your bid is submitted and the time and place of delivery; and contain your statement that you agree to all the terms, conditions, and provisions of the invitation. Failure to furnish, in the telegraphic bid, the representations and information required by the Invitation for Bids may necessitate rejection of the bid. Signed copies of the Invitation for Bids in confirmation of the telegraphic bid must be furnished by the bidder to the contracting officer within 5 calendar days of the latter's request therefor.

[36 FR 3061, Feb. 17, 1971, as amended at 42 FR 40201, Aug. 9, 1977]

§ 29-2.202-3 Place and method of delivery of supplies.

To the maximum extent practicable, invitations for bids issued by DOL shall stipulate "f.o.b. destination." Only where it is determined to be in the Government's best interest, may the contracting officer deviate from this policy.

[42 FR 40201, Aug. 9, 1977]

§ 29-2.202-50 Incorporation by reference.

There should be shown on the face of the invitation for bids or, if that sheet is not the primary one provided for the bidder's signature, on the primary sheet that is so provided, a listing of attachments which are to form a part of the bid invitation and resulting contract, as follows:

The following attachments hereto form a part of this Invitation for Bids and any resulting contract: (list attachments).

§ 29-2.202-51 Grouping of items to facilitate award.

While invitations usually stipulate "all or none" bids, if the circumstances warrant, invitations may provide that awards will be made by items or by groups of items. In such a case, care must be exercised by the contracting officer to avoid the elimination of suppliers whose capacity would be taxed by unusually large groupings. The use of reasonable groupings of inexpensive items has the following advantages:

(a) It eliminates unwarranted administrative expense by reducing the number of awards which must be made by the Government.

(b) It encourages prospective bidders to bid at prices more favorable to the Government by making larger awards possible.

§ 29-2.202-52 Discussions with bidders prior to opening date.

(a) One of the essential elements of formal advertising is that all bidders are afforded an equal opportunity to compete. For this reason, during the interval between the mailing of invitations for bids and the making of awards, discussions of the procurement with prospective bidders will be conducted only by, or with the knowledge and approval of, the contracting officer. Neither the contracting officer nor other personnel the contracting officer has authorized to communicate with the bidder shall furnish any information to a potential supplier which alone, or taken together with other information, may afford that supplier an advantage over others. However, general information which would not be prejudicial to other bidders may be furnished upon request, e.g., explanation of a particular clause or provision in the invitation for bids.

(b) If discussions with prospective bidders reveal any ambiguities or inconsistencies in the invitation which, if not corrected, may result in the receipt of nonresponsive bids, such ambiguities or inconsistencies shall be corrected. Such correction shall be achieved, prior to the opening date, by issuing a timely amendment to the invitation for bids or by canceling the invitation, as appropriate.

[36 FR 3061, Feb. 17, 1971, as amended at 42 FR 40201, Aug. 9, 1977]

§ 29-2.202-53 Prebid conference.

(a) *General.* A prebid conference is a procedure, generally reserved for complex procurements, whereby prospective suppliers (and their subcontractors, if known) are invited to a meeting, presided over by the contracting officer, where there is discussed any unusual aspect of a particular procurement for which an invitation for bids (IFB) or a request for proposals (RFP) has been issued. Whenever the contracting officer deems it in the DOL's best interest (but only, in the case of IFBs, after approval of the Director, Administrative Programs and Services, Office of the Assistant Secretary for Administration and Management) a prebid conference is authorized.

(b) *Format.* The typical format of a prebid conference is a formal presentation by the Government followed by a question and answer period. When held, a prebid conference shall be scheduled sufficiently in advance of the date set for bid or proposal opening as to permit suppliers to use the information obtained in the preparation of their bids or proposals.

(c) *Purpose.* There are two primary objectives of prebid conferences: (1) To impart information that removes areas of performance uncertainties which, unless removed, result in higher prices to DOL, i.e., by the supplier's inclusion of an amount for the uncertainty or contingency in the bid or proposed price or estimated cost;

(2) To avoid postaward performance problems about which the supplier could have been made aware at the time of bid or proposal preparation. Changes or substantial clarifications found to be necessary as a result of the prebid conference shall be communicated to suppliers and take the form of formal written amendments to the soliciting documents. Such amendments shall contain, where warranted, an appropriate extension of the closing date for the receipt of bids or proposals.

(d) *Limited application.* An important premise for procurement by formal advertising is the need for the invitation itself and its specification to be sufficiently clear and complete to insure that all bidders are bidding on the same basis. Therefore, the need for prebid conferences in advertised procurement should be infrequent. The prebid conference shall in no event be used as a substitute for formally amending a defective or ambiguous solicitation or to disseminate additional specification requirements.

[36 FR 3061, Feb. 17, 1971, as amended at 42 FR 40201, Aug. 9, 1977]

§ 29-2.202-54 Bid envelopes.

Mailing labels, tags, or envelopes, bearing "Postage and Fees Paid" indicia shall not be distributed with the invitation for bids or otherwise supplied to prospective bidders. To provide for ready identification and proper handling of bids, Optional Form 17, "Sealed Bid Label," illustrated in § 1-16.902-OF17 of this title and obtained from the General Services Administration, shall be furnished with each bid set to provide the bidder with a means of marking the envelope or other container enclosing his bid.

§ 29-2.202-55 Alternate bids.

An alternate bid is one that offers a suitable substitute for the requirements set forth in the invitation. The Government can accept an alternate bid only when the invitation specifically allows it. Contracting officer should not use this technique except where a clear benefit to DOL would result from its use and two-step formal advertising is not applicable. In deciding whether to grant such permission, the contracting officer must weigh the advantage of flexibility which the use of alternative bids offers against the difficulties in bid evaluation that result from this technique.

§ 29-2.203 Methods of soliciting bids.

§ 29-2.203-3 Publicity in newspapers and trade journals.

(a) *Paid advertisements.* Paid advertisements in newspapers and trade journals and similar advertising media may be used in conjunction with invitations for bids (or RFPs) where DOL would not otherwise obtain the full benefit of available competition.

Prices paid for advertising shall not exceed commercial rates charged to private individuals. Only Standard Form SF 1143a, "Public Voucher for Advertising Order," shall be used to place these orders. In placing official advertising no favoritism shall be shown to any publication and there shall be no discrimination either for or against any publication because of its editorial attitude. The sole consideration to govern in the placing of advertising shall be whether the use of such medium is authorized and the adequacy of the medium for achieving the objective of the advertising.

§ 29-2.205 Bidders mailing lists.

§ 29-2.205-5 Release of bidders mailing lists.

Except as provided in §§ 1-1.1003-4 and 1-2.205-5(b) of this title, no information concerning the identity of the specific sources solicited in a particular procurement shall be made available to the public prior to award.

[36 FR 3061, Feb. 17, 1971; 42 FR 40201, Aug. 9, 1977]

Subpart 29-2.3—Submission of Bids

§ 29-2.301 Responsiveness of bids.

Any bid which is not signed by the bidder or the bidder's authorized representative shall be disregarded, except when it is accompanied by other evidence which demonstrates the bidder's intention to be bound by the unsigned bid document. Examples of such evidence are a bid guarantee or a letter (which does not qualify or otherwise render the bid non-responsive) signed by the bidder referring to and clearly identifying the bid itself. In such a case, the contracting officer may waive the deficiency as a minor informality or irregularity (see § 1-2.405 of this title) and shall document the file to so indicate. Under no circumstances shall a bid be rejected at bid opening merely because it bears insufficient postage.

[36 FR 3061, Feb. 17, 1971, as amended at 42 FR 40201, Aug. 9, 1977]

§ 29-2.302 Time of bid submission.

In order to comply with §§ 1-2.302 and 1-2.303-4 of this title, where a telegraphic bid is otherwise authorized by § 29-2.202-2 and is received by telephone under the circumstances described in § 1-2.302 of this title, the identity of the telegraph office employee calling in the bidder's message by telephone shall be obtained and recorded in the invitation for bid file.

§ 29-2.303 Late bids.

§ 29-2.303-1 General.

The contracting officer may not alter the late bid regulations and procedures of § 1-2.303 of this title or in this § 29-2.303 in response to a bidder's argument either that the bid is only slightly late (e.g., several minutes) or that none of the other bidders has been prejudiced by the late bid.

[42 FR 40201, Aug. 9, 1977]

§ 29-2.303-4 Telegraphic bids.

See § 29-2.302.

§ 29-2.303-7 Disposition of late bids.

A late bid returned to the bidder shall be accompanied by a brief statement from the contracting officer that the bid was not considered because of its late receipt. This statement is required even though the contracting officer has previously notified the bidder, in compliance with § 1-2.303-6 of this title, that the bid is not being considered. In addition, if the late bid had to be opened for identification or was opened by mistake, that fact shall be included in the statement from the contracting officer accompanying the returned bid. The envelope, in that case, shall be retained in accordance with § 29-2.401.

Subpart 29-2.4—Opening of Bids and Award of Contract

§ 29-2.401 Receipt and safeguarding of bids.

To preserve bidders' confidence in the integrity of DOL's bidding system, the contracting officer shall retain in the file the envelope, wrapper, or other container (bearing the required

documentation) of a bid which was opened by mistake or which was opened for purposes of identification.

§ 29-2.402 Opening of bids.

The place selected for the opening of bids should be large enough to permit the attendance of any bidder who desires to be present at the opening. Where circumstances warrant, the contracting officer may limit contractor representation to one representative per supplier. At the bid opening, the person opening the bids shall not discuss the relative merits of any bid with the bidders, their representatives, or with casual observers. The individuals designated by DOL to conduct the bid opening are discouraged from making statements at the bid opening in response to inquiries concerning the award, e.g., DOL's intent with regard to the disposition of a bid irregularity, potential readvertisement and mistake in bid. Such questions shall instead be subsequently referred to the contracting officer for disposition. Bidders are cautioned that information obtained at bid openings from other than the contracting officer may only be relied upon by the bidder at the bidder's own risk. After the bids have been opened and read aloud to the bidders present, an announcement shall be made that the opening of bids has been completed. Where feasible, all bidders will be notified, in writing and as soon as conveniently possible, regarding the award.

[36 FR 3061, Feb. 17, 1971, as amended at 42 FR 40201, Aug. 9, 1977]

§ 29-2.402-50 Firm-bid rule.

Under the "firm-bid rule," a bidder is bound after the bid opening by the bid submitted and may not, in the absence of the exceptions provided in the mistakes in bids procedures of § 1-2.406 of this title, withdraw the bid prior to the time of award or until after the expiration of the period provided in the bid for bid acceptance. It is the Department's policy, on the other hand, that it will not be bound by its invitation for bids, except that if it does make an award based on bids submitted in response to its invitation, it must award to that responsible supplier submitting the lowest responsive bid. Aside from that, however, the Department will not be bound by any bid it receives. The Department's preferred position is justified judicially on the basis that laws concerning the advertising and award of public contracts may be construed as primarily for the Government's own benefit and protection. Therefore, no bidder acquires any enforceable rights from the Department until the valid acceptance of the bid by an official authorized to do so. The mere submission of a bid does not, in and of itself, bestow a right or grant an interest in any prospective procurement.

[42 FR 40201, Aug. 9, 1977]

§ 29-2.402-51 Marking of bids.

Under no circumstances will any individual make any marks or notation on the bid or its accompanying documents, except as authorized in § 29-2.401. If, through error or for some other reason, marks are made on a bid or its accompanying documents, the markings should not be erased or eradicated; instead, the individual so marking the bid shall prepare a signed explanation of the marking for insertion in the file for future reference, showing when, how, and why the notation or markings were made. If the marked bid is accepted, explanation with regard thereto should be made on the statement of award.

§ 29-2.402-52 Postponement of bid opening before time set for opening.

(a) The contracting officer shall attempt to reach a decision of postponement sufficiently in advance of the time set for opening so as to permit at least telephone notice to bidders of the postponement and avoid their further inconvenience. Telephone notice of a changed opening date must be confirmed by written amendment in accordance with § 1-2.207 of this title.

(b) Bid openings shall be postponed when a substantial portion of prospective bidders requests additional time for filing their bids, or the contracting officer has reason to believe that the specified opening date is not appropriate or is not conducive to the maximum practicable competition.

(c) Bid openings may be considered for postponement by the contracting officer when that official has reason to believe that the bids from a substantial portion of bidders have been delayed in the mails for causes beyond their control and without their fault or negligence, such as flood, fire, accident, heavy snow, or strikes.

[36 FR 3061, Feb. 17, 1971, as amended at 42 FR 40201, Aug. 9, 1977]

§ 29-2.402-53 Timing of acceptance and withdrawals.

A bidder's letter withdrawing a bid is not effective until it is received by the Government whereas the Government's letter accepting the bid, when written acceptance is required, is effective when mailed. Therefore, a binding contract is effected where acceptance has been mailed by the contracting officer before the letter from the bidder advising of withdrawal of the bid is received. This applies even though the bidder can furnish evidence that the letter of withdrawal was mailed prior to the time set for bid opening as set forth in § 1-2.304 of this title.

§ 29-2.404 Rejection of bids.

§ 29-2.404-1 Cancellation of invitation after opening.

If all of the bids for any item have been rejected, the contracting officer may readvertise for that item using the same specifications or modified specifications, or may negotiate under the circumstances discussed in §§ 1-3.210 and 1-3.214 of this title.

[36 FR 3061, Feb. 17, 1971, as amended at 42 FR 40201, Aug. 9, 1977]

§ 29-2.404-5 All or none qualifications.

The invitation for bids shall stipulate that all bids are solicited on an "all or none" basis except in highly unusual cases where the contracting officer can demonstrate with appropriate file documentation that it is in the Government's best interest to do otherwise. Generally, the Government's loss in flexibility when it includes this renunciation of its right to award on less than the full quantity bid upon, is more than offset by the Government's gain from the elimination of bidder uncertainty concerning the quantity to be awarded. A consequence of the elimination of this uncertainty is the elimination of any contingency factor in the price the bidder bids.

§ 29-2.404-50 Multiple bidding.

When more than one bid is received from a person or firm, or affiliates thereof, in response to an invitation for bids, such bids shall be considered for award if responsive and otherwise acceptable. If the contracting officer determines that these bids would give such a bidder an unfair advantage over other bidders or would otherwise be prejudicial to the best interest of the Government, such bids shall be rejected. In a tie bid situation, only one of the multiple bids shall be considered in applying § 1-2.407-6 of this title.

§ 29-2.406 Mistakes in bids.

§ 29-2.406-3 Other mistakes disclosed before award.

The Deputy Assistant Secretary for Administration and Management is delegated authority to make the administrative determinations described in § 1-2.406-3 of this title.

§ 29-2.406-4 Disclosure of mistakes after award.

The Deputy Assistant Secretary for Administration and Management is delegated authority to make the administrative determinations described in § 1-2.406-4 of this title.

§ 29-2.407 Award.

§ 29-2.407-3 Discounts.

Invitations for bids involving the prospects of a trade-in, allowance, rebate, or credit due from the bidder to the Government shall provide that, when a prompt payment discount is offered, the discount will be computed on the gross purchase price, i.e., the price that obtains before reduction because of any amount due from the bidder to the Government.

[36 FR 3061, Feb. 17, 1971, as amended at 42 FR 40201, Aug. 9, 1977]

§ 29-2.407-8 Protests against award.

(a) *Protests before award.* If, after bid opening but prior to award, a protest against award has been lodged and it is necessary to make an award before the matter is resolved, the contracting officer shall obtain and place in the file the written approval of the head of the agency. Prior to making an award, the head of the agency will inform the Comptroller General of the Department's intent to award and obtain advice from the Comptroller General concerning the status of the protest in accordance with § 1-2.407-8(b) of this title.

(b) *Protests after award.* In the event of a protest after award, consideration of its merit and a determination regarding its resolution, including any required reports to the Comptroller General, shall be made by the head of the agency and, where required, that official shall obtain assistance from the Solicitor.

[42 FR 40201, Aug. 9, 1977]

§ 29-2.407-50 Award when only one bid is received.

When only one bid is received in response to an invitation for bids, such bid may be considered and accepted if the contracting officer makes a written determination that (a) the specifications used in the invitation were not unduly restrictive, (b) adequate competition was solicited and it could have been reasonably assumed that more than one bid would have been submitted, (c) the price is reasonable, and (d) the bid is otherwise in accordance with the invitation for bids. Such a determination shall be placed in the file.

PART 29-3—PROCUREMENT BY NEGOTIATION

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29-3.903 Review and approval of contractor's purchasing system and subcontracts.
29-3.903-2 Review and approval of subcontracts.
29-3.950 Subcontracting by cost-type prime contractors.

AUTHORITY: 63 Stat. 389, 80 Stat. 379; 5 U.S.C. 301, 40 U.S.C. 486(c).

SOURCE: 36 FR 11647, June 17, 1971, unless otherwise noted.

NOTE: Nomenclature changes appear at 38 FR 15965, June 19, 1973.

Subpart 29-3.1—Use of Negotiation

§ 29-3.100 Scope of subpart.

§ 29-3.100-50 Other procedures applicable to negotiated procurements.

Generally, except where sections of Subparts 1-2.2 and 1-2.3 of this title and Subparts 29-2.2 and 29-2.3 of this chapter deal with aspects of bid solicitation and submission peculiar to formal advertising only (e.g., (a) the public bid opening, (b) the "formal offer" status of the bid as opposed to a proposal, and (c) the specificity with which the item being procured can be described) those subparts shall be applicable to the solicitation and submission of proposals for contracts to be effected by negotiation. In addition, within the above guidelines, the following sections shall also be applicable:

Sec.	
29-2.105	Solicitation for informational or planning purposes.
29-2.401	Receipt and safeguarding of bids.
1-2.401	Do.
29-2.406-4	Disclosure of mistakes after award.
1-2.406-4	Do.
1-2.407-2	Responsible bidder—reasonableness of price.
1-2.407-6	Equal low bids.
29-2.407-8	Protests against award.
1-2.407-8	Do.

It should be noted that deviation from the requirements in Part 1-3 of this title and this Part 29-3 may be made for contracts on a class or individual case basis with the prior written consent of the head of the agency for reasons of program or other considerations, e.g., financial assistance programs. Such deviation shall be obtained in accordance with the procedures in § 29-1.009 of this chapter.

[36 FR 11647, June 17, 1971, as amended at 42 FR 40201, Aug. 9, 1977]

§ 29-3.101 General requirements for negotiation.

§ 29-3.101-50 [Reserved]

§ 29-3.101-51 Limitations on use of requests for quotations.

Standard Form 18, "Request for Quotations," illustrated in § 1-16.901-18, of this title, shall not be used by the contracting officer to solicit, from prospective suppliers, formal legal offers which could be accepted by the Government for purposes of creating binding contracts. The limitations on the use of Standard Form 18 are set out in § 1-16.201 of this title.

§ 29-3.103 Dissemination of procurement information.

(a) During the interval between the initiation of the request for proposals and the making of an award, the limitations on communication between DOL representatives, procurement and otherwise, and prospective suppliers shall be the same as those provided in § 29-2.202-52 of this chapter for formally advertised solicitations. Moreover, no prospective supplier shall be given an advantage over competitors of advance knowledge that proposals are to be requested.

(b) The disclosure requirements of the Public Information Act, 5 U.S.C. 552, do not operate to qualify this § 29-3.103 nor the § 1-3.103(b) bar against the disclosure of information. See Part 70 of Title 29 of the Code of Federal Regulations.

[36 FR 11647, June 17, 1971, as amended at 42 FR 40201, Aug. 9, 1977]

Subpart 29-3.2—Circumstances Permitting Negotiation

§ 29-3.202 Public exigency.

When DOL requests GSA to procure an item for DOL under this exception, the DOL procuring activity must comply with the documentation requirements of § 5-3.202 of this title.

§ 29-3.203 Purchases not in excess of $10,000.

When determining whether or not the amount involved in any one transaction exceeds $10,000, the full or gross purchase price is controlling. Any prompt payment discount or the trade-in value of any article (to be offered to the vendor in exchange) is not to be deducted to qualify a procurement for the exception of § 1-3.203 of this title.

[42 FR 40202, Aug. 9, 1977]

§ 29-3.204 Personal or professional services.

Where statutory authority exists for both (a) the procurement of personal services and (b) the authorized deviation from advertising requirements for such procurement, § 1-3.215 of this title shall be the exception cited and not § 1-3.204 of this title. The statutory authority must be separate and apart from the Federal Property and Administrative Services Act of 1949, as amended, which authorizes the FPR and the DOLPR.

§ 29-3.204-50 Criteria for determining whether services are personal.

For purposes of applying the prohibition against personal services, the contracting officer shall make determinations on a case-by-case basis. In so doing, the contracting officer shall apply the circumstances of a particular case to the general criteria in this § 29-3.204-50. In determining whether services being procured are "personal" in nature, not all the criteria need be present in a particular case to justify the barring of a proposed procurement as being in violation of the proscription against personal services procurement.

(a) *Government supervision.* Based on decisions of the Comptroller General and standards published by the Civil Service Commission, the following criteria constitute some of the general standards against which to measure a proposed procurement when "Government supervision" is a factor in order to determine whether the procurement requires special statutory authority to bring it within § 29-3.204. To determine the extent of Government supervision the contracting officer should look to all of the provisions of the entire contract, not merely the work statement, schedule, or specification. Some elements of Government supervision to consider, although they need not be answerable in the affirmative in a particular situation to warrant the conclusion that Government supervision exists, are:

(1) Will the work be performed at a Government site or in close proximity to the Government's authorized representative responsible for accepting or rejecting the work to be performed?

(2) Will Government-furnished tools and facilities be used in performing the work?

(3) Will the services be applied directly in furtherance of assigned functions or missions of DOL or one of its subparts, i.e., as opposed to supporting

services or services of professional or staff assistants?

(4) Are identical or substantially comparable services meeting similar needs being performed in DOL and/or other Federal agencies by Civil Service personnel?

(5) Can the need for the particular services be said to be recurring or extending beyond 1 year, regardless of the term of the proposed procurement which, for appropriation purposes, might be limited to a year or less?

(6) Does a Government official or employee have full personal responsibility for the successful performance of the services?

(7) Does the Government control not only what services will be performed but also the full particulars of how the services will be performed?

(8) Does the contract provide payment for inputs, e.g., labor hours, as opposed to outputs, e.g., reports?

(b) *Examples of nonpersonal services.* Contracts requiring the collection of data, the delivery of lectures, services by artists, physicians, dentists, and public stenographers are usually nonpersonal. Temporary services performed by those in mechanical trades such as plumbers, electricians, etc., for the performance of a particular job whether on a time or job basis are usually considered nonpersonal.

[36 FR 11647, June 17, 1971, as amended at 38 FR 15965, June 19, 1973; 42 FR 40202, Aug. 9, 1977]

§ 29-3.205 Services of educational institutions.

[42 FR 40202, Aug. 9, 1977]

§ 29-3.205-50 Limitations.

(a) This authority shall be used only for the procurement of or the issuance of grants for specialized noncommercial services which are customarily performed by educational institutions. Use of this authority for any services other than those listed in § 1-3.205(a) of this title shall require a written determination with supporting facts by the head of the procuring activity that the particular type of service is available only from educational institutions.

(b) Proposals shall be solicited from as many educational institutions as are known to possess the required capability. This shall be consistent with § 1-3.101(c) of this title. Solicitation of a single educational institution shall require a written justification for sole source procurement in accordance with the requirements of § 29-3.210 of this chapter.

(c) Where the circumstances of both paragraphs (a) and (b) of this section pertain in the same case, the required determinations shall be combined and made by the head of the procuring activity.

[42 FR 40202, Aug. 9, 1977]

§ 29-3.210 Impracticable to secure competition by formal advertising.

[42 FR 40202, Aug. 9, 1977]

§ 29-3.210-50 Noncompetitive procurements.

(a) It is a basic Department of Labor procurement policy that the selection of contractors shall be based on competition among responsible suppliers. This requirement for maximum competition exists regardless of whether the procurement is formally advertised or negotiated. However, there are circumstances where one organization or individual has exclusive or predominant capability by reason of experience, specialized facilities, or technical competence to perform the work within the time required and at a reasonable price. To insure that DOL procurements conform fully with the basic policy prescribing competitive procurement, any proposed noncompetitive procurement in excess of $10,000 must be fully justified and approved by the Assistant Secretary for Administration and Management or, in the case of research contracts of $25,000 or more, by the Assistant Secretary for Policy, Evaluation and Research. The contracting officer is responsible for assuring that proposed noncompetitive procurements below these dollar levels are in compliance with FPR and DOLPR requirements regarding maximum competition.

(b) The DOL recognizes that noncompetitive awards may be made where the items or services are unique; where time is of the essence and only one known source can meet the Gov-

ernment's needs within the required time frame; or where it is necessary that the desired items manufactured by one source be compatible and interchangeable with existing equipment. In the event that a nonprofit, tax-exempt, or volunteer citizens' group falls within one of the preceding examples, a noncompetitive procurement may be justified. However, there is no authority justifying a sole source procurement when the factors are based solely on a firm's status as either a nonprofit organization, a tax-exempt entity, or a volunteer citizens' group. In addition, there is no authority justifying a sole source procurement on the basis that a firm can perform the services with greater ease than any other firm.

(c) Where follow-on contracts are anticipated, sufficient data should be obtained to permit competition of later contracts. In study or research contracts, where practical, the contractor's work papers shall be stipulated as a deliverable end product along with the final report. Work papers may supply sufficient background so that competition may be possible for future procurements of research effort based on a previously delivered final report of a study or research contract.

[42 FR 40202, Aug. 9, 1977]

§ 29-3.211 Experimental, developmental, or research work.

The determination referred to in § 1-3.211 of this title shall be made by the head of the procuring activity for requirements of $25,000 or less. Otherwise the head of the procuring activity shall forward the matter together with recommendations to the head of the agency for that official's determination.

[42 FR 40202, Aug. 9, 1977]

Subpart 29-3.3—Determinations, Findings, and Authorities

§ 29-3.302 Determinations and findings required.

The head of the procuring activity shall make the determinations required by § 1-3.302(d) of this title. The contracting officer shall make the determinations required by § 1-3.302 (a), (b), and (c) of this title. The head of the agency shall make the determinations required by § 1-3.302 (e) and (f) of this title.

§ 29-3.305 Form and requirements of determinations and findings.

There is no particular form of determinations and findings prescribed for DOL-wide use. Each procuring activity may prescribe its own forms, provided they meet the requirements enumerated in § 1-3.305 of this title and illustrated in § 1-3.213 of this title.

[36 FR 11647, June 17, 1971, as amended at 42 FR 40202, Aug. 9, 1977]

§ 29-3.305-50 Class determinations and findings for negotiating authority.

Class determinations and findings, when justified, shall be prepared by the contracting officer and will be approved in writing by the head of the agency. Such approval will only be granted to avoid the repetitive preparation and approval of individual determinations and findings. Class determinations and findings may only be used for a finite group of prospective procurements with a common background, purpose and identical justification for exemption from the statutory requirement to procure by formal advertising. The group of procurements must be described in detail, including the nature of the program, the approximate number of contract actions, the cumulative dollar value of the procurements covered, the type of contracts to be let, the similarity in performance requirements and objectives and the general identity of contractors (the specific identity, if known). The class determinations and findings should also contain any other information supporting the conclusion that authority to negotiate should be extended to all of the procurements in the group or class being described. A class determinations and findings shall not extend the authority to negotiate or award the procurements that are part of the class after the expiration of the fiscal year for which the class determinations and findings were approved. Class determinations and findings may be renewed from year to

year. A particular procurement, identified in a prior year's class determinations and findings, if covered by the renewal, is authorized for negotiation. However, renewal of a class determinations and findings is not a renewal of expired appropriations, regardless of whether such funds had been set-aside previously for the particular procurements whose negotiation was covered by a previous class determinations and whose negotiation authority is now being renewed.

Subpart 29-3.4—Types of Contracts

§ 29-3.403 Selection of contract type.

In preparing its negotiation position, the Government must include as one of its negotiation goals the type of contract that it prefers to consummate the particular transaction. The contract type selected as a goal requires consideration of all the circumstances of the transaction, not merely the deliverable end item. Such circumstances include the anticipated terms of the contract, product reliability of the item, the relationship between the cost risk to the Government and contractor's performance risk, the urgency of the Government's needs and the availability and/or acceptability of substitute items. The availability of competition from prospective suppliers for the item is an important factor to consider, in addition to those in § 1-3.403 of this title, in selecting a contract type.

§ 29-3.404 Fixed-price contracts.

§ 29-3.404-3 Fixed-price contract with escalation.

(a) *Description.* The purpose of using an escalation clause in a fixed-price contract is to avoid the inequitable impact on either party of a known, identifiable and extraordinary contingency that can be isolated from the usual, less severe risks of performance. Frequently, the less desirable cost-reimbursement type contract is the only alternative to an escalation clause to protect the interest of the parties against performance or cost risk in a contract that would otherwise lend itself to a fixed-price contract. Fixed-price contracts with escalation shall not be awarded without maximum limitations on the upward and/or downward price adjustment. Such limitations shall not exceed 10 percent of the contract price without the express written approval of the head of the agency. An attempt shall be made, where applicable, to make the escalation factor reciprocal where the contingency factor shows both an upward and downward vacillation from a base or index. Care shall be taken in using this type of contract that no ambiguity surrounds the terms or amount of the escalation. Each source of bases or indices used shall be of such a caliber as to be generally considered authentic by specialists in the field and published in trade journals or other business-type publications available to the public. Moreover, the base or index shall have as much correlation as possible to the variation in price of the contingency covered by the escalation clause. Where the contingency can be anticipated in advance, it may be spelled out in an appropriate escalation clause in the invitation for bid, as set out in § 1-2.104-3 of this title, or request for proposal, with no provision for deviation from the clause in the bid or proposal. Providing an escalation clause without deviation in the solicitation eliminates the problem of considering variations in this factor when evaluating competing bids or proposals.

(b) *Application.* Where escalation provisions are incorporated in the terms of a negotiated procurement, the parties shall give due recognition of the downward impact on the contractor's risk resulting from the elimination of the contingency. Since the amount of risk and who bears it are two of the dominant factors in determining a fair level of profit, reduction in risk shall be reflected in the lower level of profit negotiated. Fixed-price contracts with escalation provision shall not be used unless the overall price of the item being procured on a fixed-price basis would have been higher than the base price under the fixed-price with escalation contract.

§ 29-3.404-1 Fixed-price incentive contract.

Description—General. Next to firm fixed-price contracting, the fixed-price incentive contract imposes the maximum risk and motivation on the contractor. It is especially valuable for use in a procurement where the parties would otherwise have not been able to agree on an equitable price. Cost-plus-incentive-fee contracts as described in § 29-3.405-4 similarly also provide for a reward and penalty. A cost-plus-incentive-fee contract can focus on many different nonprice performance factors and can even achieve an order of priority among those factors. The fixed-price incentive contract is designed to motivate the contractor to hold his costs down while at the same time limit the risk to the Government if costs are not controlled. The fixed-price incentive contract requires for its application the delivery of an end product which can be precisely described and which will, at contract completion, be accepted or rejected on the basis of objective standards. Where various measurable levels of quality can be anticipated and the Government wants the contractor to be motivated toward the highest quality, then the fixed-price incentive contract, which motivates a contractor to be only cost conscious, should not be used. In such a case, a cost-plus-incentive-fee contract would be desirable.

[36 FR 11647, June 17, 1971, as amended at 42 FR 40202, Aug. 9, 1977]

§ 29-3.404-7 Retroactive price redetermination after completion.

This type of contract has narrowly limited application. Its distinctive characteristic is the combination of a ceiling price and a provision for a post-performance "downward-only" price redetermination. This fixed-price contract type offers an advantage over others where negotiation between the parties is impeded by their disagreement over the relationship between risk and price in a prospective contract of relatively short duration and low dollar value. Thus, typically, it would be applicable where a contractor will accept a fixed price contract together with the risks associated with that type of contract and yet insist on adding unrealistically (in the Department's view) high contingency factors into the fixed price the individual is willing to negotiate. In using this type of contract, care should be taken that the ceiling price represents some contractor risks; otherwise the contract takes on some of the characteristics of a cost-plus-a-percentage-of-cost-type contract prohibited in § 1-3.401(b) of this title.

[36 FR 11647, June 17, 1971, as amended at 42 FR 40202, Aug. 9, 1977]

§ 29-3.405 Cost-reimbursement type contracts.

§ 29-3.405-3 Cost-sharing contract.

Caution in the use of this type of contract is required to prevent the costs agreed to be assumed by the contractor from being recirculated in the contractor's accounting system and recharged against the cost-sharing contract or other Government contracts, directly or indirectly. When used, this type of contract shall contain a clause specifically prohibiting the recharge of any part of the contractor's "share." A cost-sharing contract providing for the contractor to share cost overruns as well as costs less than the contract ceiling will not obligate the Department to add additional funds. The contractor in such a contract is only obligated to continue to share costs if the Department elects to extend the contract with additional funds. Contracts containing a requirement that the parties share in overruns shall contain a maximum limit beyond which neither party assumes any liability for further participation in overruns. Where the mutuality of interest of both the Department and prospective suppliers is present, requests for proposals may include language recognizing the prospective joint benefits and stating that the willingness of contractors to share costs will be a factor in determining award. In no event, however, shall a lack of willingness to share costs by a prospective supplier, in and of itself, justify the rejection of a proposal as nonresponsive. To do otherwise could operate to exclude technologically su-

perior suppliers who may not wish to share costs.

§ 29-3.405-4 Cost-plus-incentive-fee contract.

This type of contract embodying a large negative fee or loss factor in conjunction with delivery or other element of performance shall not be used to overcome the limitations on the use of the liquidated damages provisions as set forth in § 29-1.315 of this chapter.

§ 29-3.405-5 Cost-plus-a-fixed-fee contract.

(a) *Limitations.* There is no departmentwide fixed-fee ceiling schedule other than the limitations imposed in § 1-3.405-5(c)(2) of this title. Within those limitations, the head of each procuring activity may establish a fee ceiling for the activity.

(b) *Administrative limitations.* In addition to the statutory limitations described in § 1-3.405-5(c)(2) of this title, fees under cost-plus-a-fixed-fee type contracts are subject to the administrative limitations set forth below:

(1) Nine percent of the estimated cost, exclusive of the fee, for any cost-plus-a-fixed-fee contract for experimental, evaluation, developmental, or research work; or

(2) Six percent of the estimated cost, exclusive for the fee, for any other cost-plus-a-fixed-fee contract. Fixed-fees within the limitations imposed by § 1-3.405-5(c)(2) of this title and in excess of those cited herein shall be submitted to the Director, Office of Grants, Procurement, and ADP Management Policy, OASAM, Washington, D.C. 20210, Attn: ABA, for approval. The request for approval shall include a detailed justification setting forth the rationale supporting the proposed fee in terms of the factors prescribed in § 1-3.808-2 of this title.

(c) *Contractor's investment in work-in-process.* The head of each procuring activity has been delegated the authority to make the determination described in § 1-3.405-5(d)(1)(ix) of this title.

[42 FR 40202, Aug. 9, 1977]

§ 29-3.405-50 Cost-plus-award-fee contract.

(a) *Description.* The use of this type of cost reimbursement contract is relatively new and stems from the desire on the part of the Government to introduce incentives into cost reimbursement contracting situations where finite measures of performance necessary for cost-plus-incentive-fee contracts are absent. The use of this type of contract requires a willingness on the part of the contractor to accept a unilateral Government determination of a suitable level of fee for the performance of the contract. By terms of the contract, this determination by the Government of the fee is excluded from the scope of the Disputes clause. The contractor's performance itself is measured against criteria included in the contract. The contractor's performance relative to these criteria is a subject for discussion between the parties at various intervals during the period of contract. The mechanics of the fee determination are unusual in that two fee elements are involved. First, there is a fee in a fixed amount or "base" fee. Second, there is a fee that is variable, the "award" fee. Maximizing the second part of the fee is the basis of the contractor's motivation to be responsive to the results of progress discussions at the periodic reviews of the contractor's performance.

(b) *Application.* The cost-plus-award-fee contract shall not be used where it is clear that a cost-plus-a-fixed-fee or cost-plus-incentive-fee contract is more appropriate.

(c) *Limitations.* The base fee shall not exceed 3 percent of the estimated cost of the contract exclusive of fee. The maximum fee (base fee plus award fee) shall not exceed the limits in §§ 1-3.405(c)(2) of this title, and 29-3.405-5(b).

[42 FR 40203, Aug. 9, 1977]

§ 29-3.406 Other types of contracts.

§ 29-3.406-1 Time and materials contract.

Although this type of contract provides for payment of a fixed price for each unit of time supplied by the contractor, the total amount of a contractor's profit and the amount of a con-

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tractor's indirect costs absorbed under the contract are increased proportionately as the number of hours worked by the contractor is increased. In order to reduce the reverse incentive inherent in this contract form, it is desirable to limit the number of hours to which the rate including profit will be applicable and to reimburse the contractor at a rate which does not include profit (and, if possible, with reduced indirect costs) for all hours worked in excess of such limit.

[36 FR 11647, June 17, 1971, as amended at 42 FR 40203, Aug. 9, 1977]

§ 29–3.407 Additional incentives.

§ 29–3.407–2 Contracts with performance incentives.

See § 29–3.405–50.

§ 29–3.408 Letter contract.

(a) A letter contract constitutes an emergency measure and can only be justified in the absence of applicability of any other contract type authorized in Subpart 1–3.4 of this title. A letter contract cannot be justified on either the need to obligate annual funds (or other funds on whose use there is a deadline) prior to the expiration of the time in which the funds can be legally obligated or the need to contract where the parties have been unable to resolve substantive disagreements. The policy of DOL is not to issue letter contracts. Exceptions to this policy can only be authorized by the head of the agency. Such policy exceptions will be permitted only in those cases where the parties are in agreement on nearly all matters of a substantive nature and are willing to document such agreement in the letter contract. In addition to those requirements in § 1–3.408(d) of this title, such substantive matters include:

(1) The location of where the work is to be performed;

(2) The parties' agreement that the letter contract will be superseded by a definitive contract within 3 months of the effective date of the letter contract or completion of 25 percent of the work, whichever occurs first;

(3) A statement of the work to be performed by the contractor;

(4) A performance or delivery schedule;

(5) The ceiling price of the contract to be definitized;

(6) An agreement as to the required clauses to be contained in the definitized contract;

(7) Limitation on contractor for failure of the parties to execute a definitized contract within the time specified in the contract, by a clause limiting reimbursement to the contractor of the lesser of either the Department's maximum liability under the letter contract or the costs incurred under the contract terms through the date specified for definitizing the contract.

(b) Limitations. Requests for authority to award a letter contract shall be addressed to the head of the agency. The request shall recite the circumstances of the particular procurement, explain its urgency, and why no other type of contract is suitable. The request shall also state to what extent there was agreement on the factors listed in paragraph (a) of this section and whether that agreement will be reflected in the terms of the letter contract. While every effort shall be made to make the letter contract as specific as circumstances permit, specific agreement on all of the seven factors specifically listed in paragraph (a) of this section is not a prerequisite for use of a letter contract. However, approval to enter a letter contract will be withheld unless there is agreement on a substantial number of the factors in paragraph (a) of this section, with the minimum number of these factors varying on a case-by-case basis. In the event that the parties have not agreed on a particular factor, then the parties shall attempt to agree on a reasonable range or narrow series of alternatives for that factor. Based on adequate justification the head of the agency, upon request, may during the period covered by the letter contract authorize in writing an extension of the life of the letter contract or an increase in the Department's liability. The maximum liability of the Department stated in the letter contract shall not exceed an amount necessary to provide for the completion of that portion of the estimated cost of the work re-

quired consistent with the policy of the letter contract being superseded by a definitive contract within 3 months or completion of 25 percent of the work, whichever occurs first. In instances where a contractor is required to make extensive initial outlays or commitments for material and equipment at the contract's inception. The Department's maximum liability may be increased up to 50 percent of the total estimated cost of the procurement consistent with § 1-3.408 of this title. In the unusual case and where adequate justification is presented, this 50 percent limitation may be exceeded at the contract's inception, with prior written approval of the head of the agency. Request for such authority, if applicable, shall be included in the initial request for approval of the letter contract.

§ 29-3.409 Indefinite delivery type contracts.

To qualify as an indefinite delivery contract, the instrument must contain language clearly associated with that general type. Moreover, such a contract shall also contain language distinguishing between the three different kinds of commitment by the Department to procure under indefinite delivery contracts, namely, that the quantity it is agreed to procure is: A definite quantity within a stated period (§ 1-3.409(a) of this title); all requirements for the stated period (§ 1-3.409(b) of this title); or an unknown amount within a prescribed known range for a stated period (§ 1- 3.409(c) of this title). Failure to describe the quantities the Department is obligated to purchase at least as specifically as is provided above for one of the three type of contracts illustrated in § 1-3.409 of this title, could result in a basic ordering agreement that may not be enforceable because of a lack of mutuality of consideration.

(a) *Definite quantity contract*—(1) *Description.* This is sometimes referred to as a "term-type" contract and is ideally suited for the procurement of items for which there exist recurrent needs. Without this type of contract the Department would be required to issue a series of contracts, resoliciting bids on each occasion when the predictable need arose. Subject to authority within a particular appropriation or in the case of special authority (e.g., the authority to subscribe to periodicals for periods in excess of 1 fiscal year while obligating annual funds as provided in 31 U.S.C. 530a) such term contracts may not be extended beyond a fiscal year.

(2) *Application.* When all of the quantities specified in a definite-quantity term contract have been delivered, the contract shall be considered complete and additional orders shall not be placed under the contract on the basis of the contractor's prior low bid for identical items. Instead, each such additional quantity shall be considered on a case-by-case basis to determine whether to advertise it or to otherwise solicit competition from available suppliers. When used, this contract obligates funds for the full quantity to be delivered over the contract period upon award and not at the time of placing individual orders designating time and place of delivery or performance.

(b) *Requirements contract.* This is another form of term contract wherein, for the full duration of the specific contract period, all the needs for a particular item or service are placed with a contractor by a simple order. Each order incorporates the terms and conditions of the basic requirements contract under which the order is placed. Procuring activities using this contract form shall stipulate a maximum quantity beyond which the contractor is not obligated to deliver the items that may be ordered under the contract. In addition, where possible, such contracts shall obligate the Department by guarantee or otherwise, to order some stated minimum amount of the item in question, thus converting it to an indefinite quantity contract as defined in § 1-3.409(c) of this title. This will thereby protect the Department in the event of drastic changes in the demand or supply of the item or in the event of a technological breakthrough. In the absence of an obligation on the Department to procure a minimum quantity, funds are only obligated when a particular order is placed. The order therefore becomes the obligating document and

must contain appropriation symbols and dollar amounts.

(c) *Indefinite quantity contract.* When used, this contract can only obligate funds covering the low (i.e., the minimum or guaranteed) end of the range of quantities the Department can purchase. Where there is no obligation on the Department to procure a minimum quantity and where payment is to be made from a central revolving fund (e.g., "Working Capital Fund") the basic contract award shall state that the appropriation data cited is not for the purpose of indicating the obligation, but rather that the money reserved for the purpose of paying invoices under the contract is being identified.

[36 FR 11647, June 17, 1971, as amended at 42 FR 40203, Aug. 9, 1977]

Subpart 29-3.6—Small Purchases

§ 29-3.602 Policy.

It is essential that authority to make small purchases be at the lowest practical operating level.

§ 29-3.602-50 Purchasing authority.

(a) *Definition.* "Purchasing authority" is an authority by which the designated purchasing officer is authorized to issue purchase orders or requisitions which do not involve the solicitation and acceptance of bids or signing of agreements or contracts.

(b) *Delegations.* See § 29-1.401(c) of this chapter.

[36 FR 11647, June 17, 1971, as amended at 42 FR 40203, Aug. 9, 1977]

§ 29-3.603 Competition.

§ 29-3.603-1 Solicitation.

(a) Quotations or offers for purchases estimated not to exceed $5,000 mayu be solicited by use of written request, telegrams, telephone, or "in-person" contact, whichever is considered by the purchasing officer to be the most appropriate for the particular transaction. Quotations or offers for purchases estimated to exceed $5,000 must be in writing and in accordance with § 1-3.603-1(d) of this title and § 1-16.201 entitled "Request for Quotations."

(b) When it is desirable to request quotations from outside the local trade area and time does not permit the use of written solicitations, telegraphic solicitation may be used. Telegraphic solicitations shall not ordinarily be used to solicit prices from local suppliers nor shall they be used if written requests for quotations can be timely made.

(c) In the absence of urgency, and where the estimated dollar amount of the purchase is between $1,000 and $10,000 quotations shall be obtained from at least three sources of supply.

[36 FR 11647, June 17, 1971, as amended at the 42 FR 40203, Aug. 9, 1977]

§ 29-3.603-2 Data to support small purchases.

When other than the lowest responsive quotation from a responsible supplier is used as the basis for the purchase, documentation of the reason(s) for rejecting any lower quotation and the name of the individual responsible for making the determination to reject such quotation shall be made a part of the purchase file.

§ 29-3.604 Imprest funds (petty cash) method.

§ 29-3.604-3 Agency responsibilities.

The Deputy Assistant Secretary for Administration and Management is responsible for the review and action prescribed by § 1-3.604-3 of this title and for requesting exceptions and additions in accordance with § 1-3.604-5 of this title.

§ 29-3.604-4 Use of imprest funds.

Purchases made from imprest funds shall follow the policy of purchasing satisfactory merchandise at fair prices without favoritism to any vendor. The item to be purchased, its price, and the quantity involved generally govern the action to be taken. If a special item costing only a few dollars is required, a minimum amount of time and expense should be devoted to consummating the transaction. However, where feasible, purchases should be made from firms offering prices most advantageous to the Department. A vendor may be reimbursed by a payment from

imprest funds for the cost of the supplies and the parcel post or other delivery charges which the vendor has already prepaid. Payments to common carriers for line haul transportation are allowable up to $100.00.

[42 FR 40203, Aug. 9, 1977]

§ 29-3.604—5 Limitations.

Officials responsible for small purchases should consider the use of imprest fund procedures for purchases amounting to $150 or less.

[42 FR 40203, Aug. 9, 1977]

§ 29-3.604-6 Procurement and payment.

Purchases through use of imprest funds shall be accomplished as follows:

(a) Requisitioning offices shall submit a requisition, D/L Form 1-1, to the Department's imprest fund cashier showing necessary information such as estimated cost, unit of issue, quantity, description, delivery requirements, and appropriation chargeable.

(b) The imprest fund cashier shall prepare D/L Form 1-110 showing appropriate information.

(c) If the method of purchase is cash upon delivery of merchandise, the vendor's representative will sign D/L Form 1-110 indicating receipt of cash and will be furnished a copy of the form. One copy shall be forwarded to the requisitioning office and the original and two copies shall be retained by the imprest fund cashier.

(d) If the method of purchase requires pick up of the merchandise, D/L Form 1-110 is to be signed by the DOL representative authorized to make the actual purchase upon receipt of the cash by the individual. One copy shall be retained by the imprest fund cashier. The original and three copies shall be submitted to the vendor who shall sign the four copies upon supplying the merchandise and receiving the cash. The vendor may retain one copy. The DOL representative shall return the original and two copies to the imprest fund cashier as well as cash register receipt, sales slip, or invoice, whichever shall be furnished by the vendor. Any excess funds are returned to cashier at this time. One copy of D/L Form 1-110 shall be forwarded to the requisitioning office and the imprest fund cashier shall retain the original and two copies.

(e) A purchase for which cash is advanced must be confirmed and the receipt returned not later than the fifth working day following the date of the advance; otherwise, the cashier shall take immediate action to recover the cash advanced.

(f) The imprest fund cashier may reimburse Department employees for amounts paid by them for approved purchases. The employee being reimbursed shall furnish the cashier with a vendor's receipt, or its equivalent as described in paragraph (d) of this section, except as otherwise provided. In addition to the vendor's receipt, the appropriation, allotment, and other identifying symbols shall be furnished to the imprest fund cashier on a Form D/L 1-1. Procedures outlined in paragraph (d) of this section will apply except that the vendor's signature on the D/L Form 1-110 will not be necessary.

(g) The cost of cash purchases must be reasonable and controlled by ordinary shopping procedures involving price comparison (competition) and the purchaser shall take advantage of any discounts obtainable.

[36 FR 11647, June 17, 1971, as amended at 42 FR 40203, Aug. 9, 1977]

§ 29-3.604-50 Designation of cashiers.

(a) The Deputy Assistant Secretary for Administration and Management, designates employees as cashiers or alternate cashiers. Upon receipt of the designation and notice of assignment to a position covered by a position schedule fidelity bond, employee is authorized to perform the duties of cashier or alternate.

(b) An alternate cashier functions in the capacity of a cashier during the absence of the cashier and/or where the volume of work requires the cashier to have alternates, in which case funds will be advanced on the following basis: The cashier and the alternate cashier will count the funds advanced in each others presence and shall immediately verify it with each other. A signed receipt for all funds advanced or returned shall be ex-

changed between the alternate cashier and cashier.

§ 29-3.604-51 Instructions for cashiers.

Prescribed procedures for operating an imprest fund are contained in the Treasury Department "Manual of Procedures and Instructions for Cashiers Operating under Executive Order No. 6166." This manual is furnished by the Treasury Department for use by each person who is designated as a cashier.

[42 FR 40204, Aug. 9, 1977]

§ 29-3.604-52 Accountability of imprest funds.

(a) *Custody and safeguarding of funds.* Cashiers shall at all times be able to account for the full amount of the fund, by way of cash on hand, uncashed Government checks, sales slips, invoices, unpaid reimbursement vouchers, or interim receipts for cash. Employees designated to serve as cashiers will act as agents of the disbursing officers who advance them the necessary funds. Since cashiers are personally accountable and responsible for the custody of and payments made from the fund, employees upon whom authority is conferred shall be fully informed of their responsibility. They are required to utilize, to the fullest extent available, means of safeguarding cash advanced to them, and be supplied with suitable facilities for that purpose including locked storage space. Imprest funds shall neither be deposited in any bank, regardless of in whose name or account it is established nor commingled with personal or other funds. Each imprest fund shall be maintained separately.

(b) *Regular transactions.* The cashier shall verify the signature of each DOL representative receiving cash with the signature on the DOL representative's DOL Identification (ID) Card. The ID Card number shall be recorded alongside the DOL representative's signature on the cashier's cash transaction record.

(c) *Doubtful transactions.* When the propriety of any disbursement is doubtful, the cashier may require written acceptance of responsibility from the official authorizing the disbursement. Such written acceptance of responsibility provides the cashier recourse to the official if the disbursement is later disallowed. The cashier may also request an advance written opinion with respect to a doubtful transaction.

(d) *Review of transactions.* Cashiers, including alternates shall periodically test vouchers submitted for payment by verifying the approving officer signature against a specimen signature maintained on file. In addition, the cashier, on selected vouchers, shall contract the approving officer and make a direct verification of the propriety of the vouchers and the amount claimed.

§ 29-3.605 Purchase order forms.

§ 29-3.605-3 Agency order forms.

Department of Labor Form 90, entitled "Purchase Order," is the form prescribed for use by DOL.

§ 29-3.605-50 Cancellation of purchase orders.

Where it is in the Government's best interest, a purchase order may be canceled. Ordinarily, orders should be canceled in writing. In order to maintain good business relations, the vendor should be advised, wherever feasible, of the necessity for cancellation in advance of formal cancellation and the vendor's concurrence obtained. The determination as to whether the public interest requires the cancellation of an order should include consideration of any Government liability resulting from the cancellation. Cancellation is generally acceptable to a vendor except where the vendor has already incurred expense in conjunction with the purchase order. In cases where the vendor will not concur in the cancellation and where in effect a contractual relationship exists, the order shall be terminated as prescribed in Subpart 1-8.2 of this title.

[36 FR 11647, June 17, 1971, as amended at 42 FR 40204, Aug. 9, 1977]

§ 29-3.605-51 Duplicate purchase orders.

If the vendor reports non-receipt, loss or other inability to locate an original purchase order and requests another copy, the purchasing officer

may issue to the vendor a duplicate copy as the vendor's basis of performance. This second issue should be conspicuously marked "Duplicate Copy." To avoid the possibility of a duplicate shipment, a letter of transmittal or a notation on the purchase order should read somewhat as follows:

This is a duplicate copy of the lost original purchase order, furnished in accordance with your request of ———— (Date). The Government will not be responsible for duplicate shipment.

[36 FR 11647, June 17, 1971, as amended at 42 FR 40204, Aug. 9, 1977]

§ 29-3.606 Blanket purchase arrangements.

§ 29-3.606-1 General.

The use of blanket purchase arrangements creates a vendor-agency relationship akin to an open account which has as its objectives the simplification of the ordering and billing in the purchase of small requirements of readily available supplies or services of the same general category. It essentially differs from other small purchase techniques in that purchase orders are not written for each purchase, billing for many items are submitted at preagreed intervals of not less than a month, and many purchases are processed with a single payment. Blanket purchase arrangements may be terminated by either party upon the delivery of written notice to the other.

§ 29-3.606-3 Establishment of account.

Once the requirements of § 1-3.606-3 of this title have been met, the arrangement should be formalized by the issue of a purchase order or other written memorandum.

§ 29-3.606-4 Documentation.

(a) It is the responsibility of the vendor to determine that a purchase chargeable to the Department is made by one who is authorized to purchase from the vendor in the name of the Department. Vendors are generally accustomed to receiving Government purchase orders which they honor even though the signer may not be known to them. This they do somewhat at their own risk. To protect the Department against criticism and the vendor against loss due to unauthorized purchases, any arrangement with the vendor for making purchases without the use of a formal purchase order must be carefully worked out. While no standard documentation of the arrangement is required, it is desirable to have a record of the vendor having been informed.

(1) Who is authorized to make individual purchases;

(2) How purchases will be placed, i.e., by phone, by certain designated persons ordering and picking up supplies from the vendor, etc.;

(3) What the vendor must do to assure that only authorized purchases are made to obtain payment, i.e., prepare an itemized sales slip showing order number, if one is given, and whether it must be signed by an authorized person; send invoice with shipment; give invoice to person picking up supplies; payment to be made once a month, or quarterly, etc.;

(4) What discounts will be given (particularly on repair parts and labor); how time discounts will be handled;

(5) Limitations by class of item, time, or dollar amount.

(b) Because of the possible need for terminating the arrangement, term contracts on prescribed contract forms should be used where contractual agreement is desired and the parties are to be bound.

(c) Each blanket purchase arrangement shall be numbered or otherwise identified in an appropriate manner and shall include reference to the authority of "41 U.S.C. 252(c)(3)."

[36 FR 11647, June 17, 1971, as amended at 42 FR 40204, Aug. 9, 1977]

Subpart 29-3.7—Negotiated Overhead Rates

§ 29-3.705 Procedure.

If the contracting officer has not received an advisory audit report on a proposed contractor, the contracting officer shall request the cognizant audit office to perform or otherwise obtain an advisory audit if the proposed contract is estimated to be $100,000 or more, and the proposed

contract includes reimbursement for overhead costs. The contracting officer shall establish provisional or fixed overhead rates not to exceed the rates as set forth in the advisory audit report. The contracting officer shall also insure that the Government receives the benefit of "off-site" overhead rates. The procedures stated herein shall be applicable to grants if required by the Government program plan.

[36 FR 11647, June 17, 1971, as amended at 42 FR 40204, Aug. 9, 1977]

§ 29-3.707 Cost-sharing rates and limitation on overhead cost.

§ 29-3.707-50 Overhead cost ceiling.

(a) The decision for or against the use of overhead ceiling shall be governed by the contracting officer's determination of the Government's best interests, program and cost considered.

(b) A newly organized, "for profit" contractor may have an unusually high rate of overhead type costs incident to starting a business which is usually manifested in an inordinately high ratio of indirect to direct contract costs. Typically, the first contract of a newly formed contractor will absorb as indirect costs, unless the contracting officer imposes a ceiling, the cost of consumable and other supplies for which outlays are made by the contractor at an extraordinarily high rate consistent with "start-up" needs.

(c) In those instances where the proposed contractor is a not-for-profit or nonprofit organization and has no alternate source of income to absorb increases in overhead costs after the contract has been negotiated, the contracting officer may consider, in lieu of an overhead ceiling, review-type administrative devices designed to curb extravagant use of indirect costs.

[36 FR 11647, June 17, 1971, as amended at 42 FR 40204, Aug. 9, 1977]

Subpart 29-3.8—Price Negotiation Policies and Techniques

§ 29-3.802 Preparation for negotiation.

(a) *General.* At no time shall a prospective offeror be advised in the Request for Proposals (RFP) or otherwise furnished the Department's cost estimate or the amount of funds it has available to effect a particular procurement. In addition, RFP's shall avoid any statement which, while not indicating a specific sum, indicates a range within which that sum may be determined. Exceptions to the above policy shall be limited to the extremely unusual circumstance wherein the parameters of a study proposal are necessarily vague. In such case, the Director, Office of Grants, Procurement and ADP Management Policy, OASAM, may authorize the publication in the RFP, or otherwise, an indication of what the Department considers an estimate of either the range in costs or professional labor time (e.g., 2 to 3 work-years) which the contractor will be required to expend to perform the work contemplated. Such range will never be narrowed to the point where the maximum is less than 50 percent more than the minimum. This exception, when authorized, shall be accompanied by suitable language in the form of a disclaimer as to any guarantee of the accuracy of the Department's estimate and inviting proposals, even if they contradict the Department's estimate, with the concomitant assurance that proposals outside the estimated range of the Government's estimate will not be rejected solely for that reason.

(b) *Request for Proposals.* (1) the RFP shall require that that proposal be in two parts; A "Technical Proposal" and a "Business Proposal." Each proposal shall be separate and complete in itself so that evaluation of one may be accomplished independently of and concurrently with the other. The RFP shall provide that the "Technical Proposal" not contain any reference to cost. However, it shall provide that resource information such as data concerning labor hours and categories, materials, subcontracts, travel, and computer time shall be included in the

"Technical Proposal" so that the offeror's understanding of the scope of work may be evaluated.

(2) The instructions to the offerors concerning the "Business Proposal" shall require submission of cost information in sufficient detail to allow a complete cost analysis. (See § 1-3.807-3 of this title for requirements for cost or pricing data.) Categories and amounts of labor, materials, travel, and computer time, as well as information with regard to contractor past performance (including contracts or subcontracts for like services or supplies), financial capacity, certifications and representations, and other pertinent administrative and business information should also be requested.

(3) Evaluation criteria must be developed by technical personnel at the time of initiation of the procurement request for inclusion by the contracting officer in the RFP. These criteria and their relative importance or weight require the exercise of judgment on a case-by-case basis, since the criteria must be tailored to the requirements of each particular procurement. These criteria must be submitted to the contracting officer in sufficient time to allow for this review before the issuance of the request for proposals. Since these criteria will serve as the standards against which all proposals will be evaluated, it is imperative that they be chosen carefully to emphasize those factors considered to be critical to the selection of a contractor.

[42 FR 40204, Aug. 9, 1977]

§ 29-3.805-50 Criteria for award.

(a) The RFP must set forth all significant matters which affect the opportunities of suppliers to compete on an equal basis, including any special evaluation factors. Evaluation factors are defined as (1) any minimum standards which will be required with respect to any particular element of the procurement, as well as (2) reasonably definite information as to the degree of importance to be given particular factors in relation to one another. Although a mathematical formula need not be used in the evaluation process, when the numerical rating is used, the RFP must inform the offerors of the major factors to be considered and the broad scheme of scoring to be used.

(b) An example of a mathematical evaluation process is set forth herein. The evaluation factors are examples only and should be changed to meet the particular needs of the individual request for proposals.

CRITERIA FOR AWARD

Prospective suppliers are advised that the selection of an offeror for contract award is to be made after a careful evaluation of the proposals received by a panel of specialists within the Department. Each panelist will evaluate the proposals for acceptability with emphasis on the various factors enumerated below, assigning to that factor a numerical weighting within the range shown for each of these factors. The scores will then be averaged to select an offeror or develop a list of offerors.

Negotiations will be initiated, if necessary, with one or more of the offerors, within the competitive range as the situation warrants, beginning with the head of the list, i.e., the offeror with the highest score, determined by the factors shown below:

	Points
A. Supplier's collective experience as it relates to the work required by the proposed contract	1-20
B. Education and experience of supplier's key personnel as they relate to the work required by the proposed contract	1-20
C. Supplier's resources and facilities	1-20
D. Planned approach in accomplishing the proposed work and its indication of the supplier's understanding of the work required	1-40

NOTE: While proposed cost will usually not be point-scored in evaluation of proposals in response to an RFP, the overall cost proposal will be analyzed and examined relative to the decision regarding the award of the procurement. The RFP should inform offerors of the cost factor's relative importance—whether the procurement is intended to achieve a minimum standard of technical excellence at the lowest cost, or whether cost is considered secondary to technical excellence.

(c) Whenever the contract is to have a fixed price, price may not be disregarded in selecting a contractor. This is particularly true where more than one acceptable offer from technically qualified sources remains for consideration after conduct of negotiations. If a lower priced, lower scored offer meets the Government's needs, acceptance of a higher priced, higher scored

offer shall be supported by a specific determination by the contracting officer that the technical superiority of the higher priced offer warrants the additional cost involved in the award of a contract to that offeror.

(d) For award of cost-reimbursement contracts, the estimated costs and proposed fees shall not be the controlling factors where offerors are not substantially equal on a technical basis. However, where offerors are substantially equal as to technical ability and resources, the price becomes the controlling factor, and the contract should be awarded to the lowest offeror. The award of cost-reimbursement contracts requires procurement personnel to exercise informed judgments as to whether submitted proposals are realistic with regard to proposed costs and technical approaches.

(e) The RFP evaluation criteria shall not be modified except by a formal amendment to the RFP.

[42 FR 40204, Aug. 9, 1977]

§ 29-3.805-51 Evaluation of technical proposals.

(a) The technical proposals received by the contracting officer shall be forwarded to the technical evaluators for evaluation; the business portion of the proposals shall be retained by the contracting officer for evaluation.

(b) The technical evaluators shall evaluate each proposal in strict conformity with the evaluation criteria of the RFP and shall assign each proposal a score. A technical ranking shall then be compiled. The technical evaluators shall then identify each proposal as either acceptable or unacceptable. Predetermined cutoff scores shall not be employed.

(c) The technical evaluators shall then determine whether any proposal which has been rated as unacceptable might be considered acceptable upon the furnishing of clarifying data by the offeror, and the contracting officer will be so informed. The contracting officer will arrange for the submission of clarifying data in writing or by consultation, and furnish it to the technical evaluators for their consideration.

(d) It is essential to the competitive procurement process that all information contained in offerors' proposals be maintained in strict confidence. In no event, during the evaluation period, shall any offeror be told the number of proposals received, prices, cost ranges, or the Government cost estimate. Discussions with offerors relative to any aspect of the procurement shall be held only with the contracting officer or his authorized representative.

(e) A technical evaluation report shall be prepared and signed by the technical evaluators, furnished to the contracting officer, and maintained as a permanent record in the contract file. The report shall reflect the scoring of each proposal and the ranking of the proposals, and shall identify each proposal as acceptable or unacceptable. The report shall also include a narrative evaluation specifying the strengths and weaknesses of each proposal, and any reservations or qualifications that might bear upon the selection of sources for negotiation and award. Concrete technical reasons supporting a determination of unacceptability with regard to any proposal shall be included.

[42 FR 40205, Aug. 9, 1977]

§ 29-3.805-52 Competitive range.

The competitive range consists of the proposals of those offerors, which, based either on an evaluation by a mathematical formula or by other means, are grouped more or less at the same level and are competitive with one another. In all cases it is important that the criteria used in establishing a competitive range be meaningful and realistic and in no way arbitrary. Determining firms which are and firms which are not within a competitive range is a matter of administrative discretion which must be exercised in a reasonable manner. A determination of the limits of the competitive range requires the comparison of each proposal against the other proposals. Therefore, there is no way to predetermine the number of or percentage of proposals that will be competitive with one another. The limits of what constitutes competitive range

in a particular case is a judgment matter for determination by the contracting officer. Such discretion will be reasonable and justified and shall not be exercised in an arbitrary or capricious manner.

[42 FR 40205, Aug. 9, 1977]

§ 29-3.805-53 Conduct of discussions.

(a) In accordance with § 1-3.805-1(a) of this title, where discussions or other negotiations are to be conducted, the contracting officer must negotiate regarding the work to be performed, the cost or price of the work, and other relevant topics with all those offerors within the competitive range.

(b) The contracting officer shall point out to each such offeror the ambiguities, uncertainties, and deficiencies, if any, in its proposal. This official shall give each offeror a reasonable opportunity (with a common cutoff date for all) to support, clarify, correct, improve, or revise its proposal. Discussions with one offeror will not identify areas in which another has apparently achieved a higher evaluation or provided more detail. Nor will information be transmitted by the Government which could give one offeror a competitive advantage over another. Cost estimates made by the Government will not be disclosed.

(c) Careful judgment will be exercised in determining the extent of discussions. In some cases, good business practice may require more than one round of discussions with all of the offerors within the competitive range. The time available, the expense and administrative limitations, and the size and significance of the procurement should all be considered in deciding on the type, duration, and depth of the discussions.

(d) In order to terminate negotiations properly, the contracting officer shall advise each offeror within the competitive range that (1) negotiations are being conducted, (2) offerors are being asked for "best and final offer," not merely to confirm or reconfirm prior offers, and (3) any revision or modification of proposals must be submitted by the cutoff date.

[42 FR 40205, Aug. 9, 1977]

§ 29-3.805-54 Selection of contractor.

After the close of discussions and the receipt of any addenda to proposals, the contracting officer shall determine whether another technical evaluation is required prior to award. The contracting officer shall then select for award the offeror or offerors whose proposal(s) offers the greatest advantage to the Government, cost or price, technical and other factors considered.

[42 FR 40205, Aug. 9, 1977]

§ 29-3.809 Contract audit as a pricing aid.

§ 29-3.809-50 Procedures.

The Assistant Secretary for Administration and Management shall perform or obtain reviews of indirect cost data in the establishment of provisional and fixed overhead rates and the performance of audits as a pricing aid, upon request of a head of a procuring activity. All such requests shall be in writing and shall be directed to the Director of Audit and Investigations in Washington, D.C. or to the Regional Administrator for Audit in the regions. Requests shall (a) describe the problem; (b) specify the purpose to be served by the audit; and (c) indicate the audit scope and depth desired.

[42 FR 40205, Aug. 9, 1977]

Subpart 29-3.9—Subcontracting Policies and Procedures

§ 29-3.903 Review and approval of contractor's purchasing system and subcontracts.

§ 29-3.903-2 Review and approval of subcontracts.

All cost-reimbursement type contracts shall:

(a) Provide for advance notification and prior approval by the contracting officer of any subcontract thereunder on a cost-reimbursement, time and material, or labor hour basis, and of any fixed-price subcontract or purchase order which exceeds in dollar amount either $25,000 or 5 per centum of the total estimated cost of the prime contract.

(b) Contain a provision that any authorized representative of the Secretary of Labor shall have the right to inspect the contract worksite and to audit the books and records of the prime contractor or any subcontractor of any tier thereunder that is not on a firm fixed-price basis.

§ 29-3.950 Subcontracting by cost-type prime contractors.

Services performed under cost-type prime contracts shall be performed to the fullest extent possible under fixed unit price or fixed-price subcontracts.

PART 29-10—BONDS AND INSURANCE

Sec.
29-10.000 Scope of part.
29-10.000-50 Policy, cost type contracts.

Subpart 29-10.1—Bonds

29-10.102 Definitions.
29-10.102-50 Fidelity bonds.
29-10.104 Performance bonds.
29-10.104-2 Other than construction contracts.
29-10.104-50 Applicability to cost type contracts.
29-10.108 Other types of bonds.
29-10.108-50 Use of fidelity bonds.
29-10.109 Execution and administration of bonds.

Subpart 29-10.3—Insurance—General

29-10.302 Notice of cancellation or change.
29-10.305 Procedures to be followed in the event of loss or damage to Government property.

Subpart 29-10.5—Insurance Under Cost-Reimbursement Type Contracts

29-10.501 Policy.

AUTHORITY: 63 Stat. 389, 80 Stat. 379; 5 U.S.C. 301, 40 U.S.C. 486(c).

SOURCE: 36 FR 8040, Apr. 29, 1971, unless otherwise noted.

§ 29-10.000 Scope of part.

§ 29-10.000-50 Policy, cost type contracts.

The direct or indirect cost to the contractor for bonds, (except performance bonds—see § 29-10.104) and insurance shall be reimbursable to contractors in cost type contracts, provided that the cost is incurred within the limitations of § 1-15.205-16 of this title or where applicable, § 1-15.309-15 of this title. In determining what insurance and costs to authorize, require or approve in conjunction with a program providing financial assistance, program managers shall consider:

(a) The interest to be insured or protected.

(b) Any unusual risks to the Government, contractors or third parties, e.g., because of the newness of the program.

(c) The cost of the protection by either insurance or bonding of the contingency being protected against.

(d) The likelihood of the occurrence of the contingency.

(e) Whether bonds or insurance are required by law or regulation.

Subpart 29-10.1—Bonds

§ 29-10.102 Definitions.

§ 29-10.102-50 Fidelity bonds.

A fidelity bond is a bond under which the guarantor agrees to indemnify an insured up to the amount stated in the bond for losses caused by employee dishonesty. The form of the fidelity bond varies, and some common types are described below:

(a) "Blanket bond" means a fidelity bond which covers all the employer's officers and employees without the further listing of any names or positions.

(b) "Blanket position bond" means a fidelity bond which provides the insured protection against dishonesty with respect to all positions (except positions expressly excluded by written endorsement by the parties to the bond) or to listed series of positions. In either event, it is the position, regardless of who occupies the position, which is covered.

(c) "Individual fidelity bond" means a bond which provides the insured protection against dishonesty with respect to a named individual.

(d) "Schedule fidelity bond" means a bond which protects the insured against dishonesty with respect to any employee included in a schedule of named positions.

§ 29-10.104 Performance bonds.

§ 29-10.104-2 Other than construction contracts.

§ 29-10.104-50 Applicability to cost type contracts.

Performance bonds shall not be furnished at Government expense in connection with DOL cost-type contracts and subcontracts.

§ 29-10.108 Other types of bonds.

§ 29-10.108-50 Use of fidelity bonds.

(a) Fidelity bonds shall not be required by contracting officers in connection with contractor's performance of fixed price contracts.

(b) In connection with cost type contracts, heads of procuring activities shall adhere to the policy considerations set forth in § 29-10.000-50.

§ 29-10.109 Execution and administration of bonds.

(a) Several prescribed forms for bonds and related documents are listed and reproduced in Part 1-16 of this title. For types of bonds other than those listed in Part 1-16 of this title, the standard bond forms of the Surety Association of America are preferred.

(b) All bonds will be reviewed by the contracting officer to ascertain that the bond offers the level of protection prescribed by the program and, when appropriate, suitably identifies the program, the risk and/or the contract.

Subpart 29-10.3—Insurance—General

§ 29-10.302 Notice of cancellation or change.

The endorsement required by § 1-10.302 of this title concerning prior notice to the approving authority of a material change in the policies affecting the interest of the Government is set forth below:

No cancellation, termination, or modification of this policy shall take effect prior to the expiration of 35 days after written notice of the cancellation, termination or modification together with suitable identification of the policy and named insured has been sent by registered letter to the Government representative at the address stated below.

Name of contracting officer———————

Address ———————————————

NOTE: The full name and business address of the contracting officer or other designated individual shall be inserted in this space.

§ 29-10.305 Procedures to be followed in the event of loss or damage to Government property.

Upon the happening of loss of or damage to any Government property for which the contractor is relieved of responsibility by contract provision, the procedures set forth in the applicable Government Property clause of the contract involved shall be followed.

Subpart 29-10.5—Insurance Under Cost-Reimbursement Type Contracts

§ 29-10.501 Policy.

Policy limits for the kinds of insurance in Subpart 1-10.5 of this title will vary from program to program. Procuring activities shall be responsible in this regard to the needs of program managers consistent with § 29-10.000-50.

PART 29-11—FEDERAL, STATE, AND LOCAL TAXES

Sec.

29-11.000 Scope of part.

29-11-000-50 Liaison with Solicitor.

§ 29-11.000 Scope of part.

(63 Stat. 389, 80 Stat. 379; 5 U.S.C. 301, 40 U.S.C. 486(c))

[36 FR 8041, Apr. 29, 1971]

§ 29-11.000-50 Liaison with Solicitor.

In order that there be uniformity in DOL's treatment of the tax aspects of contract administration, the heads of procuring activities shall coordinate with the Office of the Solicitor for purposes of obtaining information relating to Federal, State, and local tax matters. Negotiation shall not be undertaken or directed by procuring activities with any taxing authority for the purpose of determining the validity or applicability of, or obtaining ex-

emptions from or refund of, any tax, except with the approval of the Solicitor.

(63 Stat. 389, 80 Stat. 379; 5 U.S.C. 301, 40 U.S.C. 486(c))

[36 FR 8041, Apr. 29, 1971]

PART 29-12—LABOR

Subpart 29-12.12—Williams-Steiger Occupational Safety and Health Act of 1970

Sec.
29-12.1250 Scope of subpart.
29-12.1251 Basic protection.
29-12.1252 Applicability.
29-12.1253 Contract clause.
29-12.1254 Notice of award.

AUTHORITY: 80 Stat. 379, 5 U.S.C. 301; sec. 207, 76 Stat. 29, 42 U.S.C. 2587; sec. 602, 78 Stat. 528, 42 U.S.C. 2942; and sec. 204(a), 81 Stat. 888, 42 U.S.C. 639.

SOURCE: 42 FR 40205, Aug. 9 1977, unless otherwise noted.

Subpart 29-12.12—Williams-Steiger Occupational Safety and Health Act of 1970

§ 29-12.1250 Scope of subpart.

This subpart extends the standards and policies of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) to persons who are receiving occupation or job training under Department of Labor contracts but who are not employees of the contractor.

§ 29-12.1251 Basic protection.

The Occupational Safety and Health Act of 1970 provides the following basic protection for employees:

(a) It requires the employer to furnish to each employee employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to the employees.

(b) It requires the employer to comply with occupational safety and health standards promulgated under the Act, which are published in Chapter XVII of Title 29, Code of Federal Regulations.

§ 29-12.1252 Applicability.

The Department of Labor shall require its contractors providing occupational and job preparation training to persons who are not employees to protect such persons as though they were employees with respect to the provisions of Federal or State occupational safety and health standards, as applicable.

§ 29-12.1253 Contract clause.

The following clause shall be included in all contracts with the Department of Labor which provide for occupational or job preparation training (including basic education, counseling, personal and cultural development, recreational activities, and work-experience training) when the trainees are not employees of the contractor:

OCCUPATIONAL SAFETY AND HEALTH ACT

(a) In the performance of this contract, the contractor agrees to provide all trainees, who are not employees, with safety and health protection which shall be at least as effective as that which would be required under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) if the trainees were employees of the contractor thereunder.

(b) All records pertaining to injuries and illnesses of trainees who are not employees shall be maintained in accordance with the provisions of Part 1904 of Title 29 of the Code of Federal Regulations.

(c) Contractor agrees to include the substance of this clause in all subcontracts which provide for the training of persons who are not employees of the subcontractor.

(d) Failure of the contractor to comply with the provisions of this clause shall be grounds for the termination of this contract or the invocation of the "Debarred, Suspended, and Ineligible Bidders" procedures of the Federal Procurement Regulations and the Department of Labor Procurement Regulations.

§ 29-12.1254 Notice of award.

Contracting Officers of the Department of Labor shall submit a notice of award of a contract containing the clause in § 29-12.1253 to the Occupational Safety and Health Administration (OSHA) Regional Administrator within the region where the contract is to be performed at the following addresses:

REGION I

Regional Administrator, OSHA, U.S. Department of Labor, John F. Kennedy Federal Building, Government Center, Room 1804, Boston, Mass. 02203.

REGION II

Regional Administrator, OSHA, U.S. Department of Labor, 1515 Broadway (1 Astor Plaza), Room 3455, New York, NY 10036.

REGION III

Regional Administrator, OSHA, U.S. Department of Labor, Suite 2100, 3535 Market Street, Philadelphia, Pa. 19104.

REGION IV

Regional Administrator, OSHA, U.S. Department of Labor, 1375 Peachtree Street NE., Suite 587, Atlanta, GA 30309.

REGION V

Regional Administrator, OSHA, U.S. Department of Labor, 230 S. Dearborn Street, Room 3263, Chicago, IL 60604.

REGION VI

Regional Administrator, OSHA, U.S. Department of Labor, Room 602, 555 Griffin Square Building, Dallas, TX 75201.

REGION VII

Regional Administrator, OSHA, U.S. Department of Labor, 911 Walnut Street, Room 3000, Kansas City, MO 64106.

REGION VIII

Regional Administrator, OSHA, U.S. Department of Labor, Room 15010, 1961 Stout Street, Denver, CO 80202.

REGION IX

Regional Administrator, OSHA, U.S. Department of Labor, Room 9470, Federal Building, 450 Golden Gate Avenue, San Franscisco, CA 94102.

REGION X

Regional Administrator, OSHA, U.S. Department of Labor, Room 6048, 909 First Avenue, Seattle, WA 98174.

PART 29-26—CONTRACT MODIFICATIONS

Subpart 29-26.4—Novation and Change of Name Agreements

Sec.

29-26.400 Scope of subpart.
29-26.404-50 Processing novation and change of name agreements.

Subpart 29-26.4—Novation and Change of Name Agreements

§ 29-26.400 Scope of subpart.

This subpart prescribes the policy and procedures for execution of novation agreements and change of name agreements by a single Agency and novation or change of name agreements affecting more than one Agency. (See also § 1-30.710 of this title on assignment of claims in case of transfers of business or corporate mergers.)

(Sec. 205(c), 63 Stat. 390 (40 U.S.C. 486(c)))

[42 FR 40206, Aug. 9, 1977]

§ 29-26.404-50 Processing novation and change of name agreements.

(a) The Agency(ies) processing a proposed novation agreement shall promptly provide notice of the proposed agreement, including lists of affected contracts which are required by § 1-26.402(c)(2) of this title, to the Agencies having contracts with the contractor or contractors concerned. Such notice shall be transmitted to the addresses listed herein as appropriate:

Director of Adminstrative Programs and Services, OASAM, Attn: ACBB.
Office of Policy, Evaluation and Research, Employment and Training Administration, Attn: TP.
Office of National Programs, Employment and Training Administration, Attn: TDX,
Office of Field Operations, Employment and Training Administration, Attn: TG
Regional Coordination Staff, OASAM, Attn: AH.
Bureau of International Affairs, Attention: IA.
Bureau of labor Statistics, Attention: BA.

(b) All novation agreements and change of name agreements, prior to execution by the Department, shall be reviewed by the Solicitor's Office for legal sufficiency.

(c) If the Agency(ies) does not object to the proposed novation agreement within 30 days after receipt of notice, the initiating Agency shall assume acceptance of the proposed agreement.

(d) When more than one Agency has outstanding contracts with the contractor or contractors, a single agreement covering all such contracts shall be executed by the agency having the

largest unsettled dollar balance with the contractor or contractors.

(e) A signed copy of the executed novation agreement or change of name agreement shall be forwarded to the contractor; a signed copy shall be retained in the Agency executing the agreement; and, where more than one Agency is involved, two conformed copies of the agreement shall be prepared for each affected Agency. In addition, there shall be attached to each of the conformed copies of the agreement for each affected Agency a summary of the agreement and a complete list of the contracts affected.

(Sec. 205(c), 63 Stat. 390 (40 U.S.C. 486(c)))

[42 FR 40206, Aug. 9, 1977]

PART 29-50—COOPERATION WITH STATE AND LOCAL GOVERNMENTS TO COORDINATE AND IMPROVE INFORMATION SYSTEMS

Sec.

29-50.000 Scope of part.
29-50.100 General.
20-50.101 Definition.
29-50.200 Policy.

AUTHORITY: 63 Stat. 389, 80 Stat. 379; 5 U.S.C. 301, 40 U.S.C. 486(c); Reorganization Plan No. 6 of 1950, 14 FPR 3174, 64 Stat. 1263, 5 U.S.C. Appendix; Office of Management and Budget Circular No. A-90 and transmittal memorandum No. 1.

SOURCE: 43 FR 29782, July 11, 1978, unless otherwise noted.

§ 29-50.000 Scope of part.

This part describes policies and procedures for carrying out the requirements of the Office of Management and Budget (OMB) Circular No. A-90, of September 7, 1976, regarding the use of State centralized data processing facilities by State and local agencies which receive Federal assistance from the Department of Labor (DOL) (hereinafter referred to as applicable State agency). The provisions of this part shall be employed by all DOL agencies with respect to programs involving Federal assistance.

§ 29-50.100 General.

In recent years, there has been an increasing trend toward establishing centralized data processing facilities by State governments. These facilities are necessary to provide for more coordinated and effective intergovernmental flow of information concerning separate but related government programs devoted to the public needs, and to eliminate duplication. The Department of Labor, through its various Agencies, is committed to implementing comprehensive communications-based systems in support of various assistance programs (e.g., State employment security agencies support by the DOL Employment and Training Administration). The Department of Labor is also committed to cooperating with State and local governments in their efforts to achieve more coordinated and effective intergovernmental (Federal, State and local) flow of information and to eliminate unnecessary duplication. Because of a new emphasis on automation and increasing demands for greater cooperation between Federal, State and local elements of governments in the development and use of State centralized data-processing facilities, the following policies and guidelines are to be utilized in handling requests for approval of the use of State centralized facilities to process all or part of the applicable State agency's federally financed workloads.

§ 29-50.101 Definition.

The term "information system" refers to a body of organized procedures for identifying, collecting, processing, retrieving, and disseminating information. It refers both to a continuing system and to a system established for one-time reports.

§ 29-50.200 Policy.

(a) The Department of Labor will direct all applicable State agencies to cooperate and participate with State and local officials in determining the optimum means for meeting interrelated Federal, State and local information requirements, and to assure that an applicable State agency's individual requirements are not imposed in a manner which unduly impedes State and local governments' ability to meet other information requirements. When Federal information requirements are to be imposed on State or

local governments, the views of the chief executives of the units of government affected, or their authorized representatives, shall be sought, considered, and when possible, implemented; written comments from these officials shall be included in the DOL official record of the action imposing these requirements. The period of actual receipt of such comments shall be no less than 21 calendar days; this period may be extended upon a showing of good cause.

(b) The Department of Labor will approve utilization of available Federal resources to States to pay the applicable State agency's fair share of the cost of the proposed data-processing facility. The costs for providing such services shall be reasonable and in accordance with the principles contained in Federal Management Circular (FMC) 74-4 and the Department of Labor's implementing procedures entitled "ADP Cost Determination Guide: An Application of Cost Principles Contained in FMC 74-4 to ADP facilities." In determining reasonableness, consideration will be given to the several options under which the services could have been provided. The proposed system or use of a centralized facility must lead to improvements or benefits for both the applicable State agency and other elements of the State government. The quality of the service must be assured and acceptable to the applicable State agency and the Department of Labor.

(c) The Department of Labor, through applicable State agencies, will pay for centralized ADP services only on the basis of a federally-approved cost allocation and direct charge plan, and only after the completion and approval of a comparative cost analysis. Such analysis must consider book value and economic life span of applicable State agencies' owned equipment. An annual agreement between the applicable State agency and the centralized facility must establish ceiling costs and be approved by the Department of Labor; costs in excess of the agreement may not be transferred to other Federal grants or contracts. Annual efficiency and economy reviews shall be conducted to determine the method with the best cost effectiveness to meet approved applicable State agencies' objectives. Based on these reviews, the Department of Labor, through its applicable State agencies, reserves the right to terminate any centralization agreement upon a 90-day written notice.

(d) The Department of Labor will direct applicable State agencies to specifically state in their request for proposals that the State central data-processing facility has the opportunity to submit a proposal for a major procurement for providing service through its central data-processing facility.

(e) The Department of Labor encourages computer sharing by permitting other State facilities access to excess computer capacity from the applicable State agency facility on a reimbursable basis, provided that Department of Labor programs are not adversely affected. When the applicable State agency's equipment is used to service two or more cost objectives, the costs for providing such services shall be reasonable and in accordance with the cost principles contained in FMC 74-4 and the Department of Labor's implementing procedures as cited in paragraph (b) of this section.

(f) In all cases where an applicable State is served by a State centralized data-processing facility, the DOL-approved agreement between the applicable State agency and the central facility will provide for the right of Federal review and/or audit of facilities, including periodic cost determination reviews by the DOL personnel.

(g) The Department of Labor will, upon request, provide assistance to applicable State agencies in regard to developing ADP cost algorithms. The Department of Labor will review each applicable State agency for assistance in the context of other similar types of proposals being considered or previously approved, in order to assist the applicant in taking advantage of other experiences, promote appropriate compatability among systems and avoid the financing of unnecessary duplicate efforts.

(h) In instances requiring the "lead agency" role (where development of proposals involves several grant-in-aid programs or possibly several Federal

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agencies), such a role will be automatically assumed by the Federal agency having potentially the predominant financial interest. The "lead agency" will be responsible for convening all other agencies involved for the purpose of (1) conducting a joint review of the merits of the proposal, (2) exchanging views on possible agency actions, and (3) framing a coordinated approach to the proposal.

(i) The Department of Labor will participate, through applicable State agencies, in all joint meetings during the course of the developmental projects, and will be represented on all steering committees, policy committees, advisory committees, data-processing authority, etc., that affect the operation of the central facility.

PART 29-60—PROCEDURES FOR SETTLING CONTRACT DISPUTE APPEALS

Sec.

29-60.000 Scope of part.

Subpart 29-60.1—General Policy; Establishment and Functions of the Board of Contract Appeals

29-60.100 Designation and establishment.
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29-60.301 Appeals in progress.

AUTHORITY: 5 U.S.C. 301; Reorganization Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263, 5 U.S.C. Appendix.

SOURCE: 37 FR 14303, June 19, 1972, unless otherwise noted.

§ 29-60.000 Scope of part.

This part establishes a permanent Department of Labor Board of Contract Appeals (referred to hereafter as the Board), delegates authority to the Board to hear and decide, pursuant to prescribed policies and procedures, appeals from formal decisions of con-

tracting officers and other officials of the Department of Labor arising under disputes provisions of contracts awarded by the Department, and sets forth the rules of the Board. This part terminates a prior delegation (36 FR 5691) of such appellate and review functions to the General Services Administration Board of Contract Appeals, except with respect to cases currently pending before such Board.

Subpart 29-60.1—General Policy; Establishment and Functions of the Board of Contract Appeals

§ 29-60.100 Designation and establishment.

A permanent Department of Labor Board of Contract Appeals is hereby established. The Board shall be composed of members selected and appointed as provided in § 29-60.101 and is designated as the authorized representative of the Secretary of Labor to hear and decide appeals within its jurisdiction as set forth in § 29-60.102 and to perform the designated functions in connection therewith as provided in this part.

§ 29-60.101 Organization and location of the Board.

(a) The Board is located in Washington, D.C.

(b) The Board consists of the Chief Administrative Law Judge and all other Administrative Law Judges employed by the U.S. Department of Labor as provided in 5 U.S.C. 5108 and qualified to preside at hearings pursuant to 5 U.S.C. 556. The Chief Administrative Law Judge shall be the Chairman of the Board. The appeals are assigned to a panel of at least three members of the Board by the Chairman who shall designate one panel member as Chairman of the panel. The decision of a majority of the panel constitutes the decision of the Board.

(c) In the event the Chief Administrative Law Judge is temporarily unavailable to serve as Chairman of the Board he shall designate one associate member to serve for the duration of his absence.

[41 FR 35186, Aug. 20, 1976]

§ 29-60.102 Jurisdiction for considering appeals.

(a) Except as stated in paragraph (b) of this section, the Department of Labor Board of Contract Appeals (referred to herein as "the Board" shall consider and determine appeals from decisions of contracting officers and other officials of the Department of Labor arising under contracts which contain provisions requiring the determination of appeals by the head of the agency or his duly authorized representative. The Board has authority to determine appeals falling within the scope of its jurisdiction as fully and finally as might the Secretary himself.

(1) When an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the Board may in its discretion hear, consider, and decide all questions of law necessary for the complete adjudication of the issue.

(b) The authority of the Board does not apply to any matters arising from disputes relating to equal employment opportunity and labor standards.

§ 29-60.103 Powers of the Board.

(a) The Board shall have all the powers of the Secretary of Labor necessary or appropriate to the exercise of the jurisdiction and the performance of the duties provided in paragraph (a) of § 29-60.102, including but not limited to:

(1) The power to administer oaths and affirmations;

(2) The power to conduct hearings, examine and cross-examine witnesses, and to call witnesses;

(3) The power to rule upon offers of proof and admissibility of evidence;

(4) The power to regulate the course of hearings and the conduct of the parties and their representatives therein;

(5) The power to rule upon all motions;

(6) The power to grant or order oral argument before the Board or its designated panel at any stage of the proceeding;

(7) The power to make decisions in conformity with this part;

(8) The power to hold conferences for the settlement, clarification and simplification of issues; and

(9) The power and authority pursuant to 5 U.S.C. 304, to apply to the appropriate U.S. District Court for the issuance of a subpoena to compel the attendance of a witness at a board hearing or for the purpose of obtaining the formal testimony of such witness or to compel the production of other evidentiary material necessary for a proper adjudication of the case.

§ 29-60.104 Board of Contract Appeals procedure.

§ 29-60.104-1 Rules.

Appeals referred to the Board are handled in accordance with the rules of the Board (see Subpart 29-60.2).

§ 29-60.104-2 Administration and interpretation of rules.

Emphasis is placed upon the sound administration of these rules in specific cases, because it is impracticable to articulate a rule to fit every possible circumstance which may be encountered. These rules will be interpreted so as to secure a just and inexpensive determination of appeals without unnecessary delay.

§ 29-60.104-3 Preliminary procedures.

Preliminary procedures are available to encourage full disclosure of relevant and material facts, and to discourage unwarranted surprise.

§ 29-60.104-4 Delegation of authority.

The Chairman of the Board may authorize and direct any individual member of the Board to hold prehearing conferences and/or hearings and receive evidence and arguments in its stead, and to certify the record of the proceedings to the designated panel. The Board member acting pursuant to such authority may exercise any of the powers vested in the Board which are necessary to the proper performance of the functions assigned to him by the Chairman of the Board.

§ 29-60.104-5 Time, computation, and extensions.

(a) All time limitations specified for various procedural actions are computed as maximums, and are not to be fully exhausted if the action described can be accomplished in a lesser period.

(b) Except as otherwise provided by law, in computing any period of time prescribed by these rules or by any order of the Board, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day.

(c) Except for the period prescribed for filing notices of appeal and requests for reconsideration, an extension of time may be granted by the Board upon written motion by the requesting party stating good cause for such an extension.

§ 29-60.104-6 Representation of parties.

Reference to contractor, appellant, contracting officer, Government, and parties shall include respective representatives of the parties: *Provided*, The appropriate notices of appearance have been filed with the Board. An appellant may appear before the Board in person or may be represented by counsel or by any other duly authorized representative.

Subpart 29-60.2—Rules of the Department of Labor Board of Contract Appeals

§ 29-60.201 Notice of appeal.

Notice of an appeal must be in writing and may be in the form of a letter to the Secretary of Labor. The original notice of appeal, together with two copies, addressed to the Secretary, shall be filed with the contracting officer from whose decision the appeal is taken. The notice of appeal must be mailed or otherwise filed within the time specified therefor in the contract.

§ 29-60.202 Contents of notices of appeal.

A notice of appeal, which may be in the form of a letter, should indicate that an appeal is thereby intended, should identify the decision and the date thereof, from which the appeal is taken, and should furnish the number of the contract in dispute. The appeal

should describe the nature of the dispute involved in the decision and the relief sought, the contract provisions involved, and any other additional information or comments relating to the dispute which are considered to be important. The notice of appeal should be signed personally by the appellant (the prime contractor making the appeal) or by an officer of the appellant corporation, or member of the appellant firm, or by the contractor's duly authorized representative or attorney.

§ 29-60.203 Forwarding of appeals.

When a notice of appeal is received by the contracting officer, he shall transmit, directly to the Board, the original of the notice of appeal, together with the original of the envelope in which the notice of appeal was received with the date of receipt stamped thereon, and any receipt from the appellant showing the date of receipt of the decision of the contracting officer, or shall furnish information as to the date when his decision was received by the appellant. A copy of the same material shall be simultaneously furnished to the Solicitor of Labor. When the Board receives the original or copy of a notice of appeal from a source other than the contracting officer, the contracting officer shall be advised promptly, given a copy of the notice, and shall be requested to follow the same procedure as if he had received the notice directly from the appellant.

§ 29-60.204 Acknowledgment of appeal and distribution.

After the Board receives a notice of appeal, it will promptly acknowledge receipt thereof to the appellant, who shall be furnished a copy of these rules. The Board simultaneously will transmit copies of appropriate documents to the contracting officer, and the Solicitor of Labor.

§ 29-60.205 Appeal file.

§ 29-60.205-1 Preparation and submission.

Following receipt of the notice of appeal, or advice that an appeal has been filed, the contracting officer shall promptly, and in any event within 30 days, compile and transmit to the Board an appeal file consisting of copies of all documents pertinent to the appeal, together with an index listing the documents. The contracting officer shall simultaneously transmit two copies of the appeal file to the Solicitor of Labor and shall retain one copy in his office. There should be included:

(a) The decision from which the appeal is taken and any findings of fact made in connection therewith, and the letter or letters or other documents of claim in response to which the decision was issued;

(b) The contract and pertinent plans, specifications, amendments, and change orders;

(c) Correspondence between the parties and other data pertinent to the appeal;

(d) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

(e) Such additional information as may be considered material.

§ 29-60.205-2 Notification to appellant.

Upon receipt of the foregoing appeal file, the Board shall notify the appellant, provide him with a listing of its contents, and shall afford him an opportunity to examine the complete compilation at the office of the contracting officer, or at the office of the Board, for the purpose of satisfying himself as to the contents, and furnishing or suggesting any additional documentation deemed pertinent to the appeal. The Board also will promptly advise the parties regarding any later documentation of the appeal file.

§ 29-60.206 Pleadings.

§ 29-60.206-1 Complaint.

Within 30 days after receipt of notice of docketing of the appeal by the Board, the appellant shall file with the Board an original and two copies of a complaint setting forth simple, concise, and direct statements of each claim, alleging the basis with appropriate reference to contract pro-

visions for each claim, and the dollar amount claimed. Upon receipt thereof, the Board shall serve a copy upon the Solicitor of Labor. Should a complaint not be mailed or otherwise filed within 30 days, appellant's claim and notice of appeal shall be deemed to set forth its complaint and the Solicitor of Labor shall be so notified.

§ 29-60.206-2 Answer.

Within 30 days from receipt of said complaint, or the aforesaid notice from the Board, the Solicitor of Labor shall prepare and file with the Board an original and two copies of an answer thereto, setting forth simple, concise, and direct statements of its defenses to each claim asserted by appellant. This pleading shall set forth any affirmative defenses or counterclaims, as appropriate. Upon receipt thereof, the Board shall serve a copy upon appellant.

§ 29-60.206-3 Amendment of pleadings.

The Board may, in its discretion, and within the proper scope of the appeal, permit or require either party to amend its pleading upon conditions just to both parties. When issues within the proper scope of the appeal, but not raised by the pleadings or documentation described in § 29-60.206, are tried by express or implied consent of the parties, or by permission of the Board they shall be treated in all respects as if they had been raised therein. In such instances, motions to amend the pleadings to conform to the proof may be entered, but are not required. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings or the appeal file (which shall be deemed part of the pleadings for this purpose), it may be admitted within the proper scope of the appeal: *Provided, however,* That the objecting party may be granted a continuance, if necessary, to enable him to meet such evidence.

§ 29-60.207 Motions.

§ 29-60.207-1 Types.

The Board may entertain the following motions:

(a) To dismiss for lack of jurisdiction;

(b) To dismiss the appeal for failure by the contractor to state a claim for which relief can be granted;

(c) To dismiss the appeal for failure of the contractor to prosecute;

(d) To grant the appeal for failure of the Government to prosecute its defense; or

(e) Such other motions as may be appropriate.

§ 29-60.207-2 For lack of jurisdiction.

Any motion addressed to the jurisdiction of the Board, and any reply thereto, shall be promptly filed. Oral argument on the motion shall be afforded an application of either party, unless the Board determines that its decision on the motion will be deferred pending hearing on both the merits and the motion. The Board shall have the right at any time, and on its own motion, to raise the issue of its jurisdiction to proceed with a particular case, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon.

§ 29-60.208 Hearing election.

Upon receipt of the Government's answer, appellant promptly shall advise the Board whether it desires a hearing, as prescribed in § 29-60.217, or whether in the alternative it elects to submit its case on the record without a hearing, as prescribed in § 29-60.211. In appropriate cases, the appellant also shall elect whether it desires the optional accelerated procedure prescribed in § 29-60.212. The Government also shall have the right to request a hearing, and the Board may direct that a hearing be held upon its own motion.

§ 29-60.209 Prehearing briefs.

Based on an examination of the documentation described in the pleadings, and a determination of whether the arguments and authorities addressed to the issues are adequately set forth therein, the Board may, in its discretion, require the parties to submit prehearing briefs in any case in which a hearing has been elected pursuant to § 29-60.208. In the absence of a Board

requirement therefor, either party may, in its discretion and upon appropriate and sufficient notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party as arranged.

§ 29-60.210 Prehearing conference.

Whether the case is to be submitted pursuant to § 29-60.211, or heard pursuant to § 29-60.217, the Board may upon its own initiative, or upon the application of either party, call upon the parties to appear before a member of the Board for a conference to consider:

(a) The simplification or clarification of the issues;

(b) The possibility of obtaining stipulations, admissions, agreements on documents, understandings on matters already of record, or similar agreements which will avoid unnecessary proof;

(c) The limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if the case is to be heard;

(d) The possibility of agreement disposing of all or any of the issues in dispute; and

(e) Such other matters as may aid in the disposition of the appeal.

Such conferences shall be on the record at the discretion of the presiding Board member. The results of the conference shall be reduced to writing by the presiding Board member, and this writing or any transcript of the conference shall thereafter constitute part of the record.

§ 29-60.211 Submission without a hearing.

Where neither party desires a hearing, and the Board does not require one, the Board's decision will be based upon the available record as furnished by the parties.

§ 29-60.212 Optional accelerated procedure.

(a) An appeal involving sums not in excess of $10,000 shall be handled under this rule at the written request of the appellant and upon concurrence of the Board.

(b) The appeal will be decided on the basis of the available record as furnished by the parties unless a hearing has been requested by either party, or unless the Board orders a hearing.

(c) With the concurrence of the Government, the appeal shall be decided by the chairman of the panel to which the appeal has been assigned. For this purpose, the chairman of the panel is vested with all the authority and power of the full Board to hear, consider, and decide the appeal. At the discretion of the panel chairman, the panel shall participate in the decision.

(d) Under this accelerated procedure, the decision will be issued on an expedited basis, without regard to its normal position on the docket, and will be rendered in summary form unless other action appears indicated.

§ 29-60.213 Closing of the record.

§ 29-60.213-1 Time of submission for decision.

A case submitted on the record pursuant to § 29-60.211 or § 29-60.212 shall be ready for decision when the parties are so notified by the Board. A case which is heard shall be ready for decision upon receipt of transcript, or upon receipt of briefs when briefs are ordered to be submitted by the Board.

§ 29-60.213-2 Record bases for decision.

The record shall consist of the appeal file described in § 29-60.205-1, and any additional material, pleadings, briefs, records of conferences, depositions, interrogatories and answers, admissions, transcripts of hearing, and hearing exhibits.

§ 29-60.213-3 Availability of record.

This record will at all times be available for inspection by the parties at the office of the Board. In the interest of convenience, prior arrangements for inspection of the file should be made with the Clerk of the Board. Copies of material in the record may, if practicable, be furnished to appellant at the cost of reproduction.

§ 29-60.214 Depositions.

§ 29-60.214-1 When permitted.

After an appeal has been docketed, the Board may, upon motion of either party filed with the Board, with notice thereof to the other party, upon good cause shown, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery.

§ 29-60.214-2 Orders on depositions.

The time, place, and manner of taking depositions shall be governed by order of the Board.

§ 29-60.214-3 Use as evidence.

No testimony taken by deposition shall be considered as part of the evidence in the hearing of an appeal unless and until such testimony is offered and received in evidence at such hearing. Testimony will not ordinarily be received in evidence if the deponent is present and can testify personally at the hearing. In such instance, however, the deposition may be used to contradict or impeach the testimony of the witness given at the hearing. In cases otherwise decided on the record, the Board may, on motion of either party and in its discretion, receive depositions as evidence in supplementation of that record.

§ 29-60.214-4 Expenses.

All expenses of taking the deposition of any person shall be borne by the party taking that deposition, except that the other party shall be entitled to copies of the transcript of the deposition upon paying therefor.

§ 29-60.215 Interrogatories to parties, production and inspection of documents.

§ 29-60.215-1 Interrogatories to parties.

After an appeal has been filed with the Board, a party may serve on the other party written interrogatories to be answered separately in writing, signed under oath and returned within 30 days from date of service. Upon timely objection by the party, the Board will determine the extent to which the interrogatories will be permitted. The scope and use of interrogatories will be controlled by § 29-60.214.

§ 29-60.215-2 Production and inspection of documents.

Upon motion of any party showing good cause therefor, and upon notice, the Board may order the other party to produce and permit the inspection and copying or photographing of any designated documents or objects, not privileged, specifically identified, and their relevance and materiality to the cause or causes in issue explained, which are reasonably calculated to lead to the discovery of admissible evidence. If the parties cannot themselves agree thereon, the Board shall specify just terms and conditions of making the inspection and taking the copies and photographs.

§ 29-60.216 Service of papers.

Except where these rules specifically provide for service of documents by the Board, all motions, answers, briefs, notices, and all other papers filed with the Board shall be served by the filing party on the opposing party. Service shall be made by delivering in person or by mailing, properly addressed with postage prepaid, one copy of the document to the opposing party or its counsel. There shall be attached to the original of each document filed with the Board a certificate of service signed by the filing party stating that service has been made.

§ 29-60.217 Hearings.

§ 29-60.217-1 Where and when held.

Hearings ordinarily will be held in Washington, D.C., except that upon request and upon good cause shown, the Board may, in its discretion, set the hearing at another location. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals and other pertinent factors. On request or motion by either party and upon good cause shown, the Board may, in its discretion, advance or postpone a hearing.

§ 29-60.217-2 Notice of hearings.

The parties shall be given at least 15 days' notice of the time and place set for hearings. In scheduling hearing dates, the Board will give due regard to the desires of the parties, and to the requirement for just and inexpensive determination of appeals without unnecessary delay. Notice of hearing shall be acknowledged promptly by the parties. A party failing to acknowledge a notice of hearing shall be deemed to have submitted the case upon the Board record as provided in § 29-60.211.

§ 29-60.217-3 Unexcused absence of a party.

The unexcused absence of a party at the time and place set for hearings will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in § 29-60.211.

§ 29-60.217-4 Nature of hearings.

Hearings will be as informal as reasonably permissible, and will seek to provide the Board with the pertinent facts and the positions of the parties as a basis for the Board's decision or recommendation. The parties may offer such relevant evidence or argument as they deem appropriate; subject, however, to the exercise of reasonable discretion by the presiding member of the Board in supervising the extent and manner of presenting such evidence. The weight to be attached to any evidence presented will be determined by the Board.

§ 29-60.217-5 Examination of witnesses.

Witnesses before the Board may be examined orally under oath or affirmation, unless the facts are stipulated, or the presiding Board member shall otherwise order. If the testimony of a witness is not given under oath, the presiding Board member may, if he deems it expedient, warn the witness that his statements may be subject to the provisions of 18 U.S.C. 287 and 1001, and any other provisions of law imposing penalties for knowingly making false representations in connection with claims against the United States or in any matter within the jurisdiction of any department or agency thereof.

§ 29-60.217-6 Copies of papers.

(a) All documents offered in evidence at a hearing must be submitted in triplicate.

(b) When books, records, papers, or documents have been received in evidence, a true copy thereof, or of such part thereof as may be material or relevant, may be substituted therefor during the hearing or at the conclusion thereof.

§ 29-60.217-7 Posthearing submissions.

Unless otherwise directed by the Board, the parties will submit simultaneous briefs within 30 days of the receipt of the transcript, and reply briefs within 20 days of receipt of the initial briefs.

§ 29-60.217-8 Transcript of proceedings.

Testimony and argument at hearings shall be reported verbatim. Transcripts of the proceedings shall be supplied to the parties at such rates as may be fixed by contract between the Department and the reporting firm.

§ 29-60.217-9 Withdrawal of exhibits.

After a decision has become final, the Board may, upon request and after notice to the other party, in its discretion, permit the withdrawal of original exhibits, or any part thereof, by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal.

§ 29-60.218 Representation of parties.

§ 29-60.218-1 Representation of appellant.

An appellant may appear before the Board in person or may be represented by counsel or by any other duly authorized representative.

§ 29-60.218-2 Representation of Government.

Counsel designated by the Solicitor of Labor shall represent the interests of the Department before the Board. They shall file notices of appearance

with the Board, and notice thereof will be given appellant or his attorney in the form specified by the Board from time to time. Whenever it appears that appellant and the Solicitor's Office are in agreement as to disposition of the controversy, the Board may suspend further processing of the appeal in order to permit reconsideration by the contracting officer: *Provided, however,* That if the Board is advised by either party that the controversy has not been disposed of by agreement, the case shall be restored to the Board's docket.

§ 29-60.219 Decisions of the Board.

Decisions of the Board will be made in writing and a certified copy thereof will be forwarded to appellant. Copies also will be sent to the Solicitor of Labor and to the contracting officer.

§ 29-60.220 Motions for reconsideration.

A motion for reconsideration, if filed by either party, shall set forth specifically the ground or grounds relied upon to sustain the motion, and shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion. The opposing party shall have the right to file an answer to such motion within 30 days from the date of receipt of the motion for reconsideration, and either party shall have the right to request an oral argument. Reconsideration of a decision, which may include oral argument, may be granted if, in the judgment of the Board, sufficient reason therefor appears.

§ 29-60.221 Dismissal without prejudice.

Where appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board, and in any such case where the suspension has continued, or it appears that it will continue for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed.

§ 29-60.222 Remands from courts.

Whenever any matter is remanded to the Board from any court for further proceedings, each of the parties shall, within 20 days of such remand, submit a report to the Board, recommending procedures to be followed in order to comply with the court's order. The Board will review the reports and enter special orders governing the handling of matters remanded to it for further proceedings by any court, to the extent the court's directive and time limitations will permit, such orders will conform to these rules.

§ 29-60.223 Standards of conduct.

No member of the Board shall consider an appeal if he has participated in the awarding or administration of the contract in question. There shall be no communication between any party to an appeal and a Board member or Board employee concerning the merits of the appeal, unless such communication (if written) is also furnished to the other party. The Board also shall exercise care to avoid receiving, except as part of the formally established appeal record, any information having a substantial bearing upon an appeal from persons who do not represent a party in the appeal, but nonetheless have an interest in the decision to be rendered.

Subpart 29-60.3—Transitional Provisions

§ 29-60.301 Appeals in progress.

All appeals pending before the General Services Administration Board of Contract Appeals on the effective date of the rules in this part (i.e., those with respect to which a notice of appeal had been properly filed before such date) shall be processed in accordance with Department of Labor appeals procedures heretofore in effect. All other appeals pending in the Department on such date shall be processed under the procedures in effect at the time the notice of appeal was filed.

PART 29-70—ADMINISTRATIVE REQUIREMENTS GOVERNING ALL GRANTS AND AGREEMENTS BY WHICH DEPARTMENT OF LABOR AGENCIES AWARD FUNDS TO STATE AND LOCAL GOVERNMENTS, INDIAN AND NATIVE AMERICAN ENTITIES, PUBLIC AND PRIVATE INSTITUTIONS OF HIGHER EDUCATION AND HOSPITALS, AND OTHER QUASI-PUBLIC AND PRIVATE NONPROFIT ORGANIZATIONS

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AUTHORITY: 5 U.S.C. 301; 29 U.S.C. 801 *et seq.*; 29 U.S.C. 795; 30 U.S.C. 801 *et seq.*; *29 U.S.C. 651 et seq.*; 42 U.S.C. 3011 *et seq.*; 42 U.S.C. 501 *et seq.*, 1101 *et seq.*, 1321 *et seq.*; 29 U.S.C. 49 *et seq.*; OMB Circular No. A-102; OMB Circular No. A-110.

SOURCE: 44 FR 42923, July 20, 1979, unless otherwise noted.

Subpart 29-70.1—Basic Grant and Agreement Policies

§ 29-70.100 Authority.

Part 29-70 is promulgated by the Secretary of Labor pursuant to authority conferred by 5 U.S.C 301 and by the following statutes which authorize the award of financial assistance by the Department of Labor:

(a) The Comprehensive Employment and Training Act, as amended (29 U.S.C. 801 et seq.).

(b) The Employment Opportunities for Handicapped Individuals Act (29 U.S.C. 795).

(c) The Federal Mine Safety and Health Act, as amended (30 U.S.C. 801 et seq.).

(d) The Occupational Safety and Health Act, as amended (29 U.S.C. 651 et seq.).

(e) Title V, Older Americans Act of 1965, as amended (42 U.S.C. 3011 et seq.).

(f) Social Security Act, as amended (42 U.S.C. 501 et seq., 1101 et seq., and 1321 et seq.).

(g) Wagner-Peyser National Employment System Act (29 U.S.C. 49 et seq.).

§ 29-70.101 Purpose, applicability, and scope.

(a) Part 29-70 contains administrative requirements which shall govern the awarding, administering, and closing of all grants and agreements by which Department of Labor Agencies award financial assistance to recipients, that is, to State and local governments, Indian and Native American entities, public and private institutions of higher education, public and private hospitals, and other quasi-public and private nonprofit organizations. Attention is directed to § 29-70.200 which explains the organization of this part which is designed to cover multiple Federal assistance programs.

(b)(1) The requirements set forth in this part also apply, except as otherwise stated in this part, to subgrants and subagreements by which any recipient awards financial assistance received from a DOL Agency to a subrecipient whenever:

(i) The subrecipient would be a recipient if it had received financial assistance directly from a DOL Agency; and

(ii) The subrecipient in its subgrant or subagreement has agreed to perform work which is substantially the same as any type of work which the recipient has promised to perform in its grant or agreement with the DOL Agency.

(2) The requirements which apply to a recipient that is a State or local government or a federally recognized Indian tribal government also apply to a subrecipient that is a State or local government or a federally recognized Indian tribal government; and the requirements which apply to a recipient that is an Indian or Native American entity other than a federally recognized Indian tribal government, a public or private hospital or institution of higher education, or a quasi-public or private nonprofit organization also apply to a subrecipient that is an Indian or Native American entity other than a federally recognized Indian tribal government, a public or private hospital or institution of higher education, or a quasi-public or private nonprofit organization.

(c) Section 29-70.216 of this part contains the administrative requirements for contracts entered into by a recipient or subrecipient. Section 29-70.202 prescribes bonding requirements for construction contracts entered into by a recipient or subrecipient.

(d) The regulations set forth in this part do not apply to:

(1) Public contracts entered into by a DOL Agency which are subject to Federal acquisition (procurement) laws.

(2) The direct payment of funds to individuals by the DOL.

(3) Assistance to foreign or international organizations and Government-owned-contractor-operated (GOCO) facilities.

(e) The requirements set forth in this part implement the requirements which the Office of Management and Budget (OMB) has imposed upon the Department in OMB Circulars Nos. A-102 and A-110.

(1) OMB Circular No. A-102 was issued in order to require all Federal executive agencies to use uniform administrative standards for all grants and agreements by which the Federal executive agencies award financial assistance to recipients which are State and local governments and federally recognized Indian tribal governments.

(2) OMB Circular No. A-110 was issued in order to require all Federal executive agencies to use uniform administrative standards for all grants and agreements by which the Federal executive agencies award funds to recipients which are public or private institutions of higher education, public or private hospitals, Indian and Native American entities other than federally recognized Indian tribal governments, and other quasi-public and private nonprofit organizations.

(f)(1) Since the provisions of this part implement OMB Circulars Nos. A-102 and A-110 for all grants and agreements awarded by DOL Agencies, recipients and subrecipients of DOL financial assistance need no longer refer to those OMB Circulars in their performance under DOL-funded grants, agreements, subgrants, and subagreements. They may refer, instead, to the regulations under this part.

(2) Since the provisions of this part apply to all grants and agreements between DOL Agencies and recipients, there will no longer be any need, except as provided in subparagraph (f)(3) and in paragraphs (g) and (h) of this section, for other Department of Labor regulations governing the administration of such grants and agreements. Therefore, upon the publication of this part in final form, all DOL Agencies shall:

(i) Revise their regulations in order to eliminate from their program regulations all administrative requirements which cover the same subject matter as that contained in the regulations in this part. DOL Agencies, however, may reference in their program regulations, the regulations in this part; and

(ii) Distribute to all recipients copies of the regulations set forth in this part.

(3) These regulations provide the basic policies for administering grants and agreements awarded under the Comprehensive Employment and Training Act (CETA), as amended. The Employment and Training Administration may issue necessary supplemental regulations applicable only to CETA programs in an administrative section of CETA program regulations found at 20 CFR Part 676. These supplemental regulations will interpret or expand on regulations included in this part; and will not conflict with or go beyond these regulations unless the requirements have been determined to be statutory or have been approved by the OMB as necessary to achieve program objectives in accordance with paragraphs (g) and (h) of this section.

(g)(1) Whenever the statute under which a DOL Agency awards financial assistance by grant or agreement contains a provision or provisions which are specifically contrary to or which go beyond a regulation or regulations contained in this part, the statutory provision shall prevail. For example, since Title IV, Part C, Sec. 439 of the Social Security Act specifically states that all regulations governing the Work Incentive Program must be jointly promulgated by the Secretary of Labor and the Secretary of Health, Education, and Welfare, the regulations in this part do not apply, by their own terms, to grants or agreements awarded by the DOL under Title IV, Part C, of the Social Security Act (Work Incentive Program).

(2) The regulations in this part contain the maximum requirements for DOL recipients with respect to subject matter covered in OMB Circulars Nos. A-102 and A-110. Therefore, no DOL Agency shall impose upon a recipient by regulation any administrative requirement which goes beyond the requirements of this part with respect to the subject matter contained in this part unless the administrative requirement is specifically required by a statutory provision or has been approved by the OMB as a deviation necessary to meet program objectives.

(3) The question of whether or not a statutory provision requires a DOL Agency to impose upon a recipient an administrative requirement which conflicts with or which goes beyond a regulation or regulations contained in this part, with respect to the subject matter contained in this part, shall be determined by the Solicitor of Labor. Therefore, whenever a DOL Agency intends to impose such a requirement on a recipient or recipients, the proposed requirement shall first be submitted in writing to the Solicitor with a citation of the statutory provision which specifically requires it. The DOL Agency may then impose the requirement provided the Solicitor first certifies in writing to the requesting DOL Agency and to the Assistant Secretary for Administration and Management that the requirement is specifically required by the statute. The Assistant Secretary for Administration and Management shall transmit the Solicitor's certification to the OMB and shall make the certification avail-

able to the public upon written request.

(h) Whenever a DOL Agency wants to deviate from the requirements of this part, in cases in which a specific statutory provision does not require the deviation, in order to impose on recipients requirements which the DOL Agency believes are necessary to achieve program objectives, but which conflict with or go beyond the requirements of this part, the DOL Agency shall:

(1) Submit the proposed deviation to the Assistant Secretary for Administration and Management and the Solicitor of Labor with an explanation of the requirement. The Assistant Secretary for Administration and Management, after consultation with the Solicitor of Labor, shall approve or disapprove the request and transmit any DOL-approved request to the OMB for its approval.

(2) Impose the requirement only after OMB approval.

(i) When the administrative requirement involves a report subject to OMB Circular No. A-40, Management of Federal Reporting Requirements, the DOL Agency shall observe the reports clearance requirements of the circular (see § 29-70.208-4(c)).

(j) Whether or not the administrative requirement is required by statute, DOL Agencies shall observe the rule-making procedures of the Administrative Procedure Act (APA); and any additional rule-making requirements mandated by the legislation authorizing the financial assistance program. Although grants and agreements awarding Federal financial assistance are exempt from the rule-making procedures of the APA, the Secretary's regulation at 29 CFR 2.7 requires that DOL Agencies shall not use the exemption as a reason for not complying with the notice and public participation requirements thereof. The DOL Agencies may, of course, use the provisions of sec. 553(b) (A) and (B) of Title 5 of the U.S. Code to justify the omission of notice to, and public participation by, the public.

[44 FR 42923, July 20, 1979; 44 FR 48972, Aug. 21, 1979]

§ 29-70.102 Definitions.

Words and terms used in this part which are not defined in this section shall have the meaning given to them in the legislation authorizing the financial assistance. The words and terms defined in this section shall have the meanings set forth below:

(a) *Definitions—general.* "Accrual basis" is the method of accounting whereby financial transactions are recorded in accounts as they take place (that is, as goods and services are purchased or used and as revenues are earned) even though the cash in such transactions is paid out or received at other dates.

"Accrued expenditures" are the charges incurred by the recipient or subrecipient during a given period requiring provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subrecipients, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required such as annuities, insurance claims, and other benefit payments.

"Accrued income" is the sum of: (1) Earnings during a given period from services performed by the recipient and goods and other tangible property delivered to purchasers; and (2) amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

"Acquisition cost of purchased nonexpendable personal property" means the net invoice unit price of the property, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as charges for taxes, duty, protective in-transit insurance, transportation, or installation, shall be included in or excluded from acquisition cost in accordance with the recipient's regular accounting practices.

"Advance by Treasury check" means a payment made by Treasury check to a recipient of a DOL grant or agreement upon its periodic request or through the use of predetermined pay-

ment schedules to finance current operations under the project before outlays are made by the recipient.

"Advance payments" are advances of money made by the Government to a recipient pursuant to a statutory authorization and in accordance with applicable regulations prior to and in anticipation of disbursements required to carry out a project under the grant or agreement.

The term "agency" means an executive department, agency, commission, authority, administration, board, or other independent establishment in the executive branch of the Federal Government; or in a State or local government.

"Agreement" is a written legal arrangement (other than a grant or contract) whereby a DOL Agency provides financial assistance to a recipient for the purpose of carrying out an approved project under a statute administered by the DOL Agency. The term "agreement" includes "cooperative agreement."

"Applicant" means any State or local government, Indian or Native American entity, public or private institution of higher education, public or private hospital, or other quasi-public or private nonprofit organization eligible to become a recipient of a DOL grant or agreement.

"Brand name or equal" means a commercial product described by a brand name and make or model number or other nomenclature by which the product is offered to the public by a particular supplier; or another product having all characteristics of the brand name product essential to meet the recipient's needs.

"Budget," as used in this part, means the recipient's financial plan approved by the DOL Agency for carrying out the purposes of the grant or agreement. The budget includes the Federal share and, if non-Federal matching funds are required, the non-Federal share.

"Cash contributions" means cash provided by the recipient (or by third parties to the recipient) as a share of the total costs of a DOL-awarded grant or agreement.

"CETA" means the Comprehensive Employment and Training Act, as amended.

"CFR" means Code of Federal Regulations.

"Closeout" means the process by which the DOL Agency determines that all required work of the grant or agreement has been completed or that the period of the grant or agreement has expired, and that all applicable administrative actions have been completed by the recipient and the DOL Agency.

"Collaterally secured" means that fulfillment of an obligation is assured by security (property) given.

"Competitive negotiation" is a competitive procurement method which is used when the nature of services or products needed precludes development of a description or specifications which are sufficiently precise to enable all prospective suppliers to have an identical understanding of the requirement. Proposals submitted are subject to negotiation and change. Either a fixed-price or cost-reimbursement contract may be awarded.

"Completion date" (expiration date) means the date when all work under the grant or agreement is completed (if the grant or agreement stipulates completion of such work); or the date in the award document, or any supplement or amendment thereto, on which Federal assistance ends. After that date, expenditures may not be charged against the Federal share of a grant or agreement except to satisfy obligations incurred on or before that date.

"Construction," as defined in 41 CFR 1-18.101-1, means construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. For purposes of this definition, the terms "buildings, structures, or other real property" include but are not limited to buildings, structures, and improvements of all types such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, powerlines, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, and channels. Construction does not include explora-

tory drilling and other investigative work which is for the purpose of obtaining preliminary data to be used in engineering studies and which is not a part of commencing or continuing the construction process, nor does it include the manufacture, production, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, or other kinds of personal property.

In determining applicability of labor standards provisions to work under the grant or agreement, "construction" shall have the meaning given in the particular labor standards statute or Order, e.g., Davis-Bacon Act, Contract Work Hours and Safety Standards Act (29 CFR 5.2), Copeland Anti-Kickback Act (29 CFR 3.2), and Executive Order 11246 (41 CFR 60-1.3).

"Contract" means a written agreement (other than a grant or agreement) between the recipient of a DOL grant or agreement (or its subrecipients) and another party (the contractor) obligating the recipient to pay for and the contractor to furnish property or services needed to accomplish the purposes of the grant or agreement. It does not include subgrants or subagreements entered into by the recipient or subrecipient for carrying out substantive parts of the project.

"Cost analysis" means the review and analysis of a contractor's or prospective contractor's submitted cost data to form an opinion as to whether the contractor's proposed costs represent what the contract should cost to perform. It includes the verification of cost data, the necessity for specific costs, the allowability of contingencies, the reasonableness of estimated amounts, and the basis used for allocation of and appropriateness of particular items of overhead costs.

"Cost-plus-a-percentage-of-cost contract" is a cost-reimbursement contract whereby the contractor is reimbursed for costs plus a fixed percentage of costs; its effect is to increase the profit of a contractor in proportion to the contractor's increased costs. Its use is prohibited by law (41 U.S.C. 254b and 10 U.S.C. 2306(a)) in Government contracting. Its use is also prohibited in recipient or subrecipient contracting.

"Cost-reimbursement contract" means a contract which establishes an estimate of total costs for the purpose of obligating funds and a ceiling that the contractor may not exceed (except at contractor risk) unless the awarding party agrees to amend the contract to provide additional funds. This kind of contract may also provide for a fixed dollar profit which may not be increased unless the contract is amended to increase the scope of work. The contract provides for payment of all allowable costs to the extent prescribed in the contract.

"Cost sharing and matching" is an arrangement by which a portion of costs of a program financed by a grant or agreement is borne by the recipient or a third party rather than all of the program costs being borne by the DOL Agency awarding the grant or agreement.

"Department" means the U.S. Department of Labor.

"Deviation" means any grant or agreement condition, procedure, or form which deviates from those prescribed in the requirements of this part; or the failure to use standards prescribed in this part.

"Direct cost" is any cost which can be identified specifically with a particular final cost objective. Detailed definitions of direct cost are found in the applicable "cost principles" (see § 29-70.103).

"Disallowed costs" are those charges to a grant or agreement that the DOL Agency determines to be unallowable, in accordance with the applicable Federal cost principles and the conditions of the grant or agreement.

"Disbursements" are payments made by the recipient by cash or check.

"DOL" means the U.S. Department of Labor.

"DOL Agency" means a major organizational component of the DOL. DOL Agencies consist of the Bureau of International Labor Affairs, Bureau of Labor Statistics, Employment and Training Administration, Employment Standards Administration, Labor-Management Services Administration, Mine Safety and Health Administration, Occupational Safety and Health Administration, Office of the Assistant Secretary for Policy, Evaluation

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and Research, Office of the Solicitor, Office of the Assistant Secretary for Administration and Management, and Office of Information, Publications and Reports.

"Drawdowns" are cash withdrawals by a recipient against a letter of credit to pay for the Federal share of disbursements under a grant or agreement.

"Equipment" (see "nonexpendable personal property").

"Excess property" means property under the control of the DOL which, as determined by the Secretary or designee, is no longer required for the discharge of departmental responsibilities.

"Exempt property" means tangible personal property acquired in whole or in part with Federal funds, and title to which is vested in the recipient without further obligation to the Federal Government except as otherwise provided in this part. Such unconditional vesting of title shall be pursuant to Federal legislation authorizing such vesting (e.g., The Federal Grant and Cooperative Agreement Act, 41 U.S.C. 501—see § 29-70.215).

"Expendable personal property" means all tangible personal property other than nonexpendable personal property.

"Expenditures" are amounts payable or accrued for goods received, work performed, or services rendered, regardless of when paid.

"Federal funds authorized" are the total amount of Federal funds obligated by the DOL Agency for the use of the recipient of financial assistance under a grant or agreement. The amount may include any authorized carryover of funds unobligated by the recipient from prior fiscal years when permitted by law or DOL regulations and the terms of the grant or agreement.

"Federally recognized Indian tribal government" means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in Section 3 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 et seq.) certified by the Secretary of the Interior as eligible for the special programs and services provided by the Department the of Interior through the Bureau of Indian Affairs.

"Financial assistance" means money, property, services, or anything of value, transferred by a DOL Agency to a recipient where the principal purpose of the transfer is to accomplish a public purpose of support or stimulation authorized by Federal statute.

"Fixed-price contract" is a contract which provides for a specific price not subject to adjustment by reason of the cost experience of the contractor in performing the contract unless a clause provides for equitable adjustment or other revision upon the occurrence of an event or contingency.

"Formal advertising" is a competitive procurement method which is normally used when the nature of the product or service permits development of a precise description or adequate specifications so that prospective suppliers will be enabled to have an identical understanding of the requirement. Bids are solicited publicly through advertising and by issuing "Invitations for Bids." In response to the solicitation, "formal" sealed bids are submitted which are not subject to negotiation or change. The sealed bids are opened publicly on a specified date and are read aloud. A firm fixed-price contract is awarded to the responsible bidder whose bid, conforming to the material terms and conditions of the invitation for bids, is lowest in price.

"Grant" means a written legal arrangement (other than a contract or agreement) between a DOL Agency and an eligible recipient whereby the DOL Agency provides Federal financial assistance to the eligible recipient for the purpose of carrying out an approved project which is part of a DOL Agency financial assistance program. The term "grant" may also refer to money, or property in lieu of money, paid or funished by the DOL Agency to an eligible recipient under programs that provide Federal financial assistance through grants.

"Grantee" means the recipient of a DOL Agency grant who is responsible for carrying out the approved project and for accounting to the DOL Agency for the use of Federal funds.

"Grant officer" means a DOL employee who has been delegated authority to award and administer grants and agreements on behalf of the Department.

"Handicapped individual" means any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

"Hospital" means an institution which: (1) Is primarily engaged in providing, by or under the supervision of physicians to inpatients, (i) diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or (ii) rehabilitation services for the rehabilitation of injured, disabled, or sick persons; (2) maintains clinical records on all patients; (3) has bylaws in effect with respect to its staff of physicians; (4) has a requirement that every patient must be under the care of a physician; (5) provides 24-hour nursing service rendered or supervised by a registered professional nurse, and has a licensed practical nurse or registered professional nurse on duty at all times; (6) has in effect a hospital utilization review plan which meets the requirements of the law; (7) in the case of an institution in any State in which State or applicable local law provides for the licensing of hospitals (i) is licensed pursuant to such law or (ii) is approved, by the agency of the State or locality responsible for licensing hospitals, as meeting the standards established for such licensing.

"Immediate family" means husband, wife, son, daughter, parent, brother, sister, uncle, aunt, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, niece, nephew, stepparent and stepchild.

"Incremental funding" means the funding of a grant or agreement in increments when an award is made prior to the necessary amount of Federal funds becoming available to the DOL. Awards are conditioned upon funds becoming available, and the DOL assumes no legal liability beyond funds available at time of award until the grant officer gives the recipient written notice of availability of additional funds (see § 29-70.211-5(c)).

"Indian and Native American entities" include federally recognized Indian tribal governments; Indian tribes, bands, or groups which are not federally recognized including urban and rural nonreservation Indians; and Indian and other Native American quasi-public or private nonprofit business entities. The term includes Aleuts, Eskimos, and for purposes of CETA and other Acts which classify native Hawaiians as native Americans, Hawaiians.

An "indirect cost" is one which, because of its incurrence for common or joint objectives, is not readily subject to treatment as a direct cost. Detailed definitions of "indirect costs" are found in the applicable "cost principles" (see § 29-70.103).

"In-kind contributions" are noncash contributions provided by the recipient or third parties as all or part of the recipient's matching share of a project when the recipient is required, by terms of the grant or agreement, to share in the costs of a project.

"Institution of higher education" means an educational institution in any State which: (1) Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such certificate; (2) is legally authorized within such State to provide a program of education beyond secondary education; (3) provides an educational program for which it awards a bachelor's degree or provides not less than a two-year program which is acceptable for full credit toward such a degree; (4) is a public or other nonprofit institution; and (5) is accredited by a nationally recognized accrediting agency or association; or, if not so accredited, (i) is an institution with respect to which the Commissioner of Education has determined that there is satisfactory assurance, considering the resources available to the institution, the period of time, if any, during which it has operated, the effort it is making to meet accreditation standards, and the purpose for which this determination is being made, that the institution will meet the accreditation standards of

such an agency or association within a reasonable time; or (ii) is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited. Such term also includes any school which provides not less than a one-year program of training to prepare students for gainful employment in a recognized occupation and which meets the provisions of clauses (1), (2), (4), and (5).

"Instrumentalities of a State" mean agencies, commissions, departments, or other State-level bodies created by the State to perform State functions. The term does not include the governments of the political subdivisions of a State e.g., a county, city, or town.

"Invitation for bids" (IFB) is a set of documents which includes a description of the product or service desired and all other information needed to enable a prospective contractor to submit a bid. The invitation for bids is the specific term applied to the solicitation used in Government contracts when the formal advertising procurement method is used.

"Joint funding" means an undertaking that includes components proposed or approved for assistance under more than one Federal program (or one or more Federal programs and one or more State programs) provided that each contributes materially to the accomplishment of a single purpose or related purposes.

"Letter of credit" is an instrument, certified by an authorized DOL official, which authorizes the recipient to draw funds when needed, up to a dollar limit, from the Treasury in accordance with provisions of § 29-70.210 of this part.

"Local government" means a local unit of government including specifically a county, municipality, city, town, township, local public authority, school district, intrastate district, council of governments, sponsor group representative organization, and other regional or interstate government entity, or any agency or instrumentality of a local government exclusive of institutions of higher education and hospitals.

"Minority bank" means a bank in which more than 50 percent of the outstanding stock is owned by members of a minority group; or a bank with less than 50 percent minority ownership in which the nonminority stockholders have turned voting rights over to members of a minority group, making it minority-controlled.

"Minority business" means a business controlled by minority group members, at least 50 percent of which is owned by minority group members or, in cases of publicly owned businesses, at least 51 percent of the stock of which is owned by minority group members. For the purpose of this definition, minority group members include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, and other minorities who are socially or economically disadvantaged.

"Modification" means any written alteration of the approved grant or agreement to show changes in amount, terms or conditions, budget, or project period, scope of project, or other administrative, technical, or financial provisions. The changes may be accomplished by unilateral action of the DOL Agency or the recipient in accordance with applicable regulations and terms of the grant or agreement; or by mutual agreement of the DOL Agency and the recipient.

"Negotiated procurement" is a procurement method (normally competitive) which is used when the nature of a product or service precludes the development of specifications or a precise description so that all prospective suppliers have an identical understanding of the requirement. Responses to solicitations (proposals) are not opened publicly; contents are generally not revealed prior to award; and they may be changed following evaluation, discussion, and negotiation.

"Noncompetitive negotiation" means negotiated procurement in which a proposal is solicited from only one source; or, after solicitation of a number of sources, competition is deemed inadequate.

"Nonexpendable personal property" means tangible personal property having a useful life of more than 2 years and an acquisition cost of $500

or more per unit. A recipient may use its own definition provided that such definition includes all tangible nonexpendable personal property covered by the above definition.

"Nonprofit organization," for purposes of this part, means any corporation, trust, foundation, agency, or other organization which (1) is entitled to exemption under section 501(c)(3) of the Internal Revenue Code, or (2) is not organized for profit and no part of the net earnings of which inures, or will inure upon dissolution, to the benefit of any private shareholder or individual; Indian and Native American organizations other than federally recognized Indian tribal governments; and public hospitals and public institutions of higher education.

"Obligations" are the amounts of orders placed, contracts, subgrants, or subagreements awarded, services received, and similar transactions taking place during a given period, which will require payment during the same or a future period.

"OMB" means the Office of Management and Budget.

"Outlays" represent charges made to the project and include: (1) If reported on an accrual basis: (i) The sum of actual cash disbursements for direct charges for goods and services, (ii) amount of indirect expense incurred, (iii) value of in-kind contributions applied, and (iv) net increase or decrease in the amounts owed by the recipient for goods and other property received; services performed by employees, contractors, subrecipients, and other payees; and other amounts becoming owed under the project for which no current services or performance is required such as annuities, insurance claims, and other benefit payments. (2) If reported on a cash basis: (i) The sum of actual cash disbursements for direct charges for goods and services, (ii) amount of indirect expense charged, (iii) value of in-kind contributions applied, and (iv) amount of unliquidated cash advances and payments made to subrecipients.

"Personal property" means property of any kind except real property. It may be tangible—having physical existence, or intangible—having no physical existence (e.g., patents and copyrights). Tangible property may be expendable or nonexpendable.

"Procurement" means the acquisition of property or services, including construction (through purchase orders, contracts, leases, or other means) which are needed by DOL recipients or subrecipients in carrying out projects under DOL grants or agreements. The term also applies to acquisitions by the Federal government.

"Program" means a DOL plan for carrying out legislative objectives assigned to the DOL for which funds have been appropriated by Congress (e.g., Migrant and Seasonal Farmworkers Programs).

"Program income" means gross income earned by the recipient from grant or agreement supported activities. Such earnings include, but shall not be limited to: Income from service fees, sale of commodities, usage or rental fees, and royalties on patents or copyrights. It does not include interest earned on Federal funds pending their disbursement for activities under the grant or agreement.

"Project" means a group of related activities which a recipient undertakes after the DOL has approved and funded the activities by awarding a grant or agreement pursuant to achieving objectives of a DOL program.

"Project costs" are all costs (allowable under terms of the grant or agreement and applicable cost principles) which are incurred by a recipient in accomplishing grant or agreement objectives during the project period.

"Public money" (as defined in Treasury Department Circular No. 176) includes, without being limited to, revenue and funds of the United States and any funds the deposit of which is subject to the control or regulations of the United States or any of its officers, agents, or employees.

"Quasi-public organization" means an organization which has many of the characteristics of a public organization, but which is not actually a public organization (e.g., community action agencies, educational associations).

"Real property" means land, including land improvements, and structures and appurtenances thereto, excluding movable machinery and equipment.

"Recipient" means an entity identified in § 29-70.101(e) (1) and (2) of this subpart receiving Federal funds, property, services, or anything of value as financial assistance or as support or stimulation to accomplish a public purpose through a DOL grant or agreement.

"Records" are documents of actions taken with respect to the grant or agreement including financial records, statistical records, and supporting documents.

"Reimbursement by Treasury check" is a payment made to a recipient with a Treasury check upon request for reimbursement for payments made by the recipient for costs incurred under the grant or agreement.

"Request for proposal" (RFP) is a set of documents which includes a description of the product or service desired to enable a prospective contractor to submit a proposal which includes information that procurement and technical personnel need to evaluate proposals submitted. The request for proposals is the specific term applied to the solicitation used in Government contracts when negotiated procurement procedures are used.

"Responsible contractor" (responsible bidder) means a contractor or prospective contractor who appears to possess the ability to perform successfully under the terms and conditions of a proposed procurement based on a review of such factors as a satisfactory record of past performance, integrity, and business ethics; and financial and technical resources or access to such resources.

"Responsive" means that a bid or proposal complies, with respect to method and timeliness of submission and to substance of the bid or proposal, in all material respects, with the requirements of the invitation for bids or request for proposals. A minor irregularity in a bid or proposal, which is deemed to be a matter of form rather than substance, the correction of which would not be prejudicial to other bidders, does not render a bid or proposal nonresponsive.

"Secretary" means the Secretary of Labor or the Secretary's designee.

"Small business" means any business concern organized for profit which is independently owned and operated and is not dominant in its field of operations and can further qualify under the criteria concerning the number of employees, average annual receipts, or other criteria currently prescribed by the Small Business Administration (SBA). (See Sec. 632, Small Business Act, as amended—15 U.S.C. 632.)

"Small purchases" (in Government contracting) are purchases of a nonconstruction character in which the aggregate amount in any one transaction including handling and other costs, is $10,000 or less. Unless State or local laws require otherwise, bilateral agreements are normally not required, and purchase orders, vouchers or bills, sales slips, memorandums of oral price quotations, or similar records provide adequate documentation to meet Federal standards.

"State" means any of the several States of the United States, the District of Columbia, and the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of State institutions of higher education and hospitals.

"Subagreement" means a written agreement between a recipient under a DOL Agency agreement (other than a grant) and an eligible entity, whereby the recipient provides funds for the purpose of the subrecipient carrying out part of the substantive programmatic work of the project approved by the DOL Agency under the recipient's agreement with the DOL.

"Subgrant" means a written agreement between a recipient under a DOL Agency grant and an eligible entity, whereby the recipient provides funds for the purpose of the subgrantee carrying out a part of the substantive programmatic work of the project approved by the DOL Agency under the recipient's grant with the DOL.

"Subgrantee" means the organization or individual to which a subgrant is awarded by a DOL grantee for the purpose of carrying out a part of the

substantive programmatic work of the DOL grant.

"Subrecipient" means a subgrantee (or an organization or individual with a subagreement other than a subgrant) receiving DOL funds through a DOL recipient for the purpose of carrying out a part of the substantive programmatic work of the DOL grant or agreement.

"Supplies" (see "expendable personal property").

"Suspension" means an action of the DOL Agency which temporarily suspends Federal assistance under a grant or agreement pending corrective action by the recipient or a decision by the DOL to terminate the grant or agreement in accordance with § 29-70.213.

"Termination" means the withdrawal by the DOL Agency of Federal assistance, in whole or in part, under a grant or agreement at any time prior to the date of completion because the recipient has failed to comply with conditions of the grant or agreement; or because the recipient and the DOL Agency have mutually agreed that continuation of the project (or part of a project) is not feasible.

"Unliquidated obligations," for reports prepared on an accrued expenditure basis, mean the amount of obligations incurred by the recipient for which an outlay has not been recorded. For reports prepared on a cash basis, "unliquidated obligations" mean the amount of obligations incurred by the recipient which has not been paid.

"Unobligated balance" is the portion of funds authorized by the DOL Agency which has not been obligated by the recipient, that is, the cumulative funds authorized minus the cumulative obligations.

"Working capital advance basis" means the procedure whereby funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period, after which payments are made by reimbursing the recipient by Treasury check for approved cash disbursements made under the grant or agreement.

(b) *Special definitions—CETA.* "Project" means, for purposes of Titles II and VI of CETA, a definable task or group of related tasks which will be completed within a definable period of time, has a public service objective, will result in a specific product or accomplishment, and would otherwise not be done with existing funds (see also 20 CFR 675.4) (CETA, sec. 3(19)).

"Small business," for purposes of subsection 704(a) of CETA, means any private, for-profit enterprise employing 500 or fewer employees (CETA, sec. 704(a)(2)).

[44 FR 42923, July 20, 1979; 44 FR 48972, Aug. 21, 1979, as amended at 45 FR 82829, Dec. 16, 1980]

§ 29-70.103 Cost principles.

In determining allowable costs under a grant or agreement, the DOL Agency shall use Federal cost principles referenced in this section which are applicable to the recipient's organization; shall ensure that each recipient receives a copy of applicable cost principles; and shall allow only those costs permitted under the cost principles which are reasonable, allocable, necessary to achieve approved program goals, and which are in accordance with DOL Agency policy and terms of the grant or agreement. The following cost principles apply:

(a) *State and local, and federally recognized Indian tribal governments.* Federal Management Circular (FMC) 74-4 provides principles for determining costs applicable to grants and agreements with State and local, and federally recognized Indian tribal governments. The Circular is codified in the Code of Federal Regulations at 41 CFR 1-15.7. Section J of FMC 74-4 assigns to the Department of Health, Education, and Welfare (DHEW) the primary responsibility for negotiation, approval, and audit of cost allocation plans to cover central support service costs of the States. The OMB assigns primary responsibility for negotiation, approval, and audit of indirect cost proposals of departments within a State to a single Federal agency. DHEW maintains lists of such assignments.

(b) *Institutions of higher education.* OMB Circular A-21 entitled, "Cost Principles for Educational Institutions," provides principles for deter-

mining costs applicable to grants and agreements with public and private institutions of higher education. OMB Circular A-88 assigns to a cognizant agency the responsibility for coordinating the establishment of indirect cost rates and auditing Federal grants with most colleges and universities.

(c) *Other nonprofit organizations.* OMB Circular A-122 entitled, "Cost principles for nonprofit organizations," provides principles for determining costs applicable to grants and agreements with nonprofit organizations. The Circular does not apply to: Colleges and universities covered by OMB Circular A-21; hospitals; or specific nonprofit organizations identified in Attachment C to OMB Circular A-122 that, because of their size and nature of their operations, shall operate their grants and agreements under cost principles applicable to commercial concerns (41 CFR 1-15.2). Pending the development of cost principles for hospitals, cost principles located at 41 CFR 1-15.2 or such other cost principles as may be specified by the grant officer in the grant or agreement document shall govern allowable costs under grants or agreements with hospitals.

[44 FR 42923, July 20, 1979, as amended at 45 FR 82829, Dec. 16, 1980]

§ 29-70.104 Applicability of labor standards.

(a) *General.* Prevailing wage requirements of the Davis-Bacon and related Acts (see 40 U.S.C. 276a-7 and 29 CFR Part 1, Appendix A) apply to recipient contractors and subcontractors who undertake construction activities (see § 29-70.216):

(1) If the statute providing Federal financial assistance specifically provides that such wage requirements apply; or

(2) If the recipient finances the construction with any funds from a grant or agreement with another Federal agency which requires compliance with prevailing wage requirements of the Davis-Bacon and related Acts.

(b) *Applicability—CETA grants and agreements.* Recipients and subrecipients are required to ensure that prevailing wages, as determined by the Secretary pursuant to the Davis-Bacon Act, are paid:

(1) By their contractors and subcontractors to laborers and mechanics, including participants, employed in construction (including alteration, repair, painting, decorating, etc.) which is federally assisted under the Act and related to a facility or building which is used primarily for programs under the Act; and

(2) To laborers and mechanics, including participants, who are employed in construction (including alteration, repair, painting, decorating, etc.) on any project which is funded wholly or partially under a Federal statute, other than CETA, which requires the payment of prevailing wage rates determined in accordance with the Davis-Bacon Act.

§ 29-70.105 Additional requirements—Certain recipients.

(a) A DOL Agency may impose additional requirements on an individual applicant for or recipient of financial assistance under a DOL grant or agreement if the grant officer determines, on the basis of monitoring, preaward survey, or audits, that the applicant or recipient: (1) Has a history of poor performance; (2) is not financially stable; or (3) has a management system which does not meet DOL standards as set forth in this part.

(b) In imposing additional requirements, the DOL Agency shall provide a written notification to the applicant or recipient which: (1) Identifies additional standards imposed; (2) provides an explanation as to why the standards are needed; and (3) explains corrective actions which must be taken by the applicant or recipient for requirements to be removed.

(c) The DOL Agency shall simultaneously provide a copy of the notification to the OMB and, if other Federal agencies are also funding an applicant or recipient, to those Federal agencies.

(d) A recipient may impose additional requirements on an individual subrecipient for reasons and under conditions identified in paragraphs (a) and (b). If additional requirements are imposed, the recipient shall provide a

copy of the written notification furnished the subrecipient to the grant officer.

§ 29-70.106 Transfer of substantive work—Nonprofit organizations.

The DOL Agency shall require that a recipient which is a nonprofit organization (as defined in § 29-70.102) transfer programmatic substantive work of the grant or agreement by subgrant, subagreement, or contract only after obtaining prior written approval of the grant officer. This restriction does not apply to purchases of supplies, material, equipment, or support services. Programmatic substantive work means work that achieves the primary public purpose goal for which the grant or agreement was awarded as opposed to support services.

Subpart 29-70.2—Administrative Standards for DOL Grants and Agreements

§ 29-70.200 Arrangement of regulations.

(a) The regulations in this subpart cover or reference the DOL administrative requirements for all financial assistance awarded under grants and agreements of DOL Agencies. Each section of the regulations covers a Federal standard established in an attachment to OMB Circulars Nos. A-102 and A-110. The sections are numbered consecutively throughout the regulations. They are captioned to reflect the subject matter covered. For example, the regulations include a section captioned, "§ 29-70.202 *Bonding and insurance.*" This section provides all DOL requirements regarding bonding and insurance for recipients of DOL grants and agreements with the following exceptions:

(1) Certain Federal standards set forth in OMB Circular No. A-110 (which covers grants and agreements with nonprofit organizations, as defined in § 29-70.102) differ from standards set forth in OMB Circular No. A-102 (which covers grants and agreements with State and local and federally recognized Indian tribal governments). Where the standards differ, supplemental paragraphs are added at the end of the general requirements to provide the special requirements applicable to grants and agreements with nonprofit organizations. The addition of the letter "a" following the section number and the words "special requirements, nonprofit organizations" identify requirements which differ from the general requirements, e.g., "§ 29-70.202a *Bonding and insurance—special requirements, nonprofit organizations.*"

(2) The legislation authorizing financial assistance under Comprehensive Employment and Training Act (CETA) grants and agreements mandates certain Federal requirements which differ from requirements generally applicable to DOL grants and agreements regardless of whether the recipient would be subject to OMB Circular No. A-102 standards or to those of OMB Circular No. A-110. Where CETA requirements differ, the special CETA requirements are set forth or are referenced in supplementary paragraphs following the standards generally applicable to DOL grants and agreeements. The CETA requirements may be identified by the letter "b" following the section number and by the addition of the words "CETA requirements" in the caption, e.g., "§ 29-70.202b *Bonding and insurance—CETA requirements.*"

(b) Unless supplementary paragraphs to the DOL regulations covering a standard are added, the overall DOL regulations apply.

[44 FR 42923, July 20, 1979; 44 FR 48972, Aug. 21, 1979]

§ 29-70.201 Cash depositories.

§ 29-70.201-1 General policy.

This section sets forth standards covering the use of banks and other institutions as depositories for Federal funds advanced under DOL grants and agreements. No DOL Agency shall require that a recipient maintain a separate bank account for such funds nor shall the Agency establish eligibility requirements for cash depositories except as provided in this section.

§ 29-70.201-2 DOL requirements.

(a) *Separate bank accounts.* When a DOL Agency advances funds to a recipient, the following shall apply:

(1) In accordance with Section 202 of the Intergovernmental Cooperation Act of 1968, a recipient which is a State need not maintain a separate bank account.

(2) A recipient other than a State shall maintain a separate bank account if:

(i) The DOL Agency advances funds under a letter-of-credit agreement which provides that drawdowns will be made on a "checks paid" basis, i.e., when funds are not withdrawn from the Treasury until the recipient's checks are presented to the bank for payment (Letters of credit with States will not provide for drawdowns on a "checks paid" basis.); or

(ii) The DOL Agency imposes a special requirement on an individual applicant or recipient in accordance with § 29-70.105.

(3) Except as otherwise provided by the grant officer, a recipient required to maintain a separate bank account shall be subject to procedures prescribed in the CFR at 41 CFR 1-30.413 and 41 CFR 1-30.414.

(b) *Eligibility requirements—cash depositories.* A recipient shall deposit advanced Federal funds in a bank with Federal Deposit Insurance Corporation (FDIC) insurance coverage if the funds are subject to the control or regulation of the United States or any of its officers, agents, or employees (public moneys). The balance exceeding FDIC coverage must be collaterally secured. Funds are deemed to be public moneys if the funding legislation specifies that funds advanced are deemed to be public moneys (generally because substantial portions of total Federal funds are advanced). Since the DOL requires that advances to recipients be limited to immediate cash needs (see § 29-70.210), and present authorizing legislation does not mandate otherwise, funds advanced under DOL grants and agreements are *not* considered to be "public moneys."

(c) *Use of minority banks.* Pursuant to Executive Order 11625, which established the national goal of expanding opportunities for minority business enterprise, the recipient and its subrecipients are encouraged to use minority banks. The Department of the Treasury periodically publishes a "Roster of Minority Banks" to assist potential users in locating minority banks. Copies of the rosters are furnished Federal executive branch agencies. The recipient may obtain the names of minority banks in its area from DOL Agency officials.

§ 29-70.202 Bonding and insurance.

§ 29-70.202-1 General policy.

A recipient of financial assistance under a DOL grant or agreement shall follow its normal bonding and insurance requirements except as otherwise indicated in this section.

§ 29-70.202-2 Federal bonding and insurance requirements.

(a) *Bonding requirements—recipient contracts for construction or facility improvements.* Except as otherwise required by law, grants or agreements requiring the contracting or subcontracting for construction or facility improvements shall provide that:

(1) The recipient shall follow its own requirements relating to bid guarantees, performance bonds, and payment bonds on the part of its contractors or subcontractors with contracts and subcontracts of $100,000 or less.

(2) The recipient shall impose the following requirements on its contractors or subcontractors if the contracts exceed $100,000 unless the grant officer has made a written determination that the DOL's interest is adequately protected without the imposition of the requirements:

(i) *A bid guarantee from each bidder (prospective contractor) equivalent to 5 percent of the bid price.* The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying the bid as assurance that the bidder will, upon acceptance of its bid, execute the necessary contractual documents within the time specified.

(ii) *A performance bond on the part of the contractor for 100 percent of the contract price* that secures fulfillment

of all of the contractor's obligations under the contract.

(iii) *A payment bond on the part of the contractor for 100 percent of the contract price* to assure payment as required by law of all persons supplying labor and material in the execution of work provided for in the contract.

(b) *Insurance requirements.* The DOL assumes no liability with respect to bodily injury, illness, or any other damages or losses, or with respect to any claims arising out of any activities undertaken under a DOL grant or agreement, whether concerning persons or property in the recipient's organization or third parties. The recipient is advised to insure or otherwise protect itself with regard to activities under the grant or agreement.

(c) *Loan guarantees.* If the DOL Agency, in connection with a grant or agreement, guarantees or insures the repayment of money borrowed by a recipient, the DOL Agency shall determine whether the recipient's bonding and insurance requirements are adequate to protect the DOL's interest. If not deemed adequate, the recipient shall adopt additional bonding and insurance requirements deemed necessary by the grant officer.

§ 29-70.202-3 Acceptable sureties.

If the DOL Agency requires that a recipient obtain bonds, the recipient shall obtain such bonds from companies holding certificates of authority as acceptable sureties (31 CFR Part 223, "Surety Companies Doing Business With the United States"). A consolidated list of acceptable surety companies is published each July in the FEDERAL REGISTER as Treasury Circular 570. Interim changes are published in the FEDERAL REGISTER as they occur.

§ 29-70.202a Bonding and insurance—Special requirements, nonprofit organizations.

§ 29-70.202a-1 Fidelity bonds.

If the recipient has no fidelity bond coverage, it shall, prior to grant or agreement award, obtain fidelity bond coverage for all officers and employees who have authority to make disbursements of funds furnished by the DOL. Fidelity bond coverage shall be in the form of blanket position bonds in amounts not exceeding $25,000, the amount to be established by the grant officer.

§ 29-70.202b Bonding and insurance—CETA requirements.

§ 29-70.202b-1 Fidelity bonds.

(a) *Bonding requirement.* A recipient (or subrecipient) shall ensure that every officer, director, agent, or employee authorized to act on behalf of the recipient or subrecipient in receiving or depositing funds into program accounts; or in issuing financial documents, checks, or other instruments of payment for program costs shall be bonded to provide protection against loss. A CETA recipient (or applicant) shall include provisions of bonding arrangements in the description of administrative systems in the grant or agreement application or in the Master Plan (as appropriate).

(b) *Amount of coverage.* If a recipient's or subrecipient's administrative system provides for fidelity bonds, the grant officer shall accept the existing bond coverage if it meets the following criteria:

(1) $100,000; or

(2) An amount equal to the highest advance received through Treasury check or by drawdown on the letter of credit during the immediately preceding grant or agreement period; or, if a new recipient, the highest advance planned for the present grant or agreement period (see sec. 20 CFR 676.43(b)) (CETA, sec. 134).

§ 29-70.202b-2 Insurance.

If a recipient, in conducting activities under a DOL grant or agreement, uses motor vehicles, the recipient shall ensure that it and its subrecipients and contractors are protected; and that the DOL is held harmless against claims arising from the ownership, maintenance, or use of a motor vehicle. This protection is limited to automobile liability insurance covering bodily injury and property damage. The recipient shall provide the insurance through a DOL-approved self-insurance program or through a commercial insurance policy. The DOL requires a minimum coverage of $100,000

per person and $300,000 per accident for bodily injury, and $25,000 per accident for property damage. If a State or local law (or a Federal law applicable to a recipient's operations such as the Farm Labor Contractor Registration Act of 1963—see 29 CFR 40.14) requires higher coverage, the insurance requirements of such laws shall prevail. If in a DOL program, the recipient uses a motor vehicle which is owned by someone other than the recipient or which is also used for non-DOL program purposes, the DOL shall prorate its share of the premiums, including any additional coverage required to conform to requirements of this paragraph, in accordance with the vehicle's actual use in conducting activities under the grant or agreement.

§ 29-70.202b-3 Special procedures—Operation of Young Adult Conservation Corps (YACC) and Job Corps programs.

For liability incurred by participants in YACC or Job Corps programs, see CETA regulations at 20 CFR Part 684 and 20 CFR Part 685 (CETA, sections 465(b) and 805(a)).

[44 FR 42923, July 20, 1979; 44 FR 48972, Aug. 21, 1979]

§ 29-70.203 Retention of and custodial requirements for records.

§ 29-70.203-1 General.

The recipient of a DOL grant or agreement shall observe the record retention and custodial requirements set forth in this section.

§ 29-70.203-2 Record retention policy.

The recipient shall retain all records pertinent to a grant or agreement, including financial and statistical records and supporting documents, for a period of 3 years, subject to the qualifications set forth in § 29-70.203-3.

§ 29-70.203-3 Retention periods.

(a) The retention period will begin on the date of submission by the recipient of the annual or final expenditure report, whichever applies to the particular grant or agreement, except that the recipient shall retain records for nonexpendable property acquired with financial assistance awarded by a DOL Agency for a period of 3 years after final disposition of the property.

(b) If, prior to the expiration of the 3-year retention period, any litigation or audit is begun or a claim is instituted involving the grant or agreement covered by the records, the recipient shall retain the records beyond the 3-year period until the litigation, audit findings, or claim has been finally resolved.

(c) When records subject to retention requirements are transferred to or maintained by the DOL, the 3-year retention period shall not apply. The recipient need not retain duplicates of records transferred to or maintained by the DOL.

§ 29-70.203-4 Substitution of microfilm.

The recipient may substitute microfilm copies in lieu of original records after audit.

§ 29-70.203-5 Records with long-term retention value.

Upon the written request of the grant officer, the recipient shall transfer records with long-term retention value (beyond the 3-year period) to the DOL unless the recipient continually uses the records and delivery would necessitate duplicate record-keeping. When this situation exists, the recipient may retain such records after obtaining written permission of the grant officer to do so. Such permission shall be conditioned upon tender of the documents to the DOL prior to their destruction.

§ 29-70.203-6 Access to records.

(a) *Secretary of Labor and Comptroller General.* The recipient shall ensure that the Secretary of Labor and the Comptroller General of the United States, or any of their duly authorized representatives, have access to any pertinent books, documents, papers, and records of the recipient organization and to records of its subrecipients and contractors to make audits, examinations, evaluations, excerpts, and transcripts.

(b) *Public access to records.* No DOL Agency shall place restrictions on a recipient which will limit public access to grant or agreement records except

that the DOL Agency may impose restrictions if:

(1) Such restrictions are required by applicable Federal law; or

(2) The Secretary or designee determines that certain records should be kept confidential in order to protect personal privacy.

§ 29-70.203b Retention of and custodial requirements for records—CETA requirements.

§ 29-70.203b-1 Records required by the Secretary of Labor.

In addition to the requirements stated in § 29-70.203-6(a), each CETA recipient shall ensure that the following records are maintained for the period described in § 29-70.203-2 and § 29-70.203-3, and made available to the Secretary or authorized designee:

(a) Records including books of account for the expenditure of CETA funds to enable the Secretary to audit and monitor the program. Records shall include information regarding participant eligibility and the propriety of participant selection procedures and practices (CETA, sec. 103(a)(11)).

(b) Records concerning each employee and participant involved in a CETA program. Records shall provide any information needed by the Secretary for reports to the President and to the Congress required by Section 127 of the Act (CETA, sec. 133(a)(1)).

§ 29-70.203b-2 Special retention requirements.

The recipient shall maintain a record of each participant's participation in a CETA program, including dates of entry and termination in each activity; and shall retain such records for each participant for a period of 5 years from date of enrollment into the program (see also CETA regulations at 20 CFR 676.35). (CETA, sec. 121(c).)

§ 29-70.203b-3 Records available to the public.

(a) Each recipient shall retain and make available to the public the following records:

(1) A list of available potential recipient contractors and potential subrecipients who have expressed, in writing, an interest in providing services under the grant or agreement (CETA, sec. 103(a)(3)(B)).

(2) Financial records relating to public service employment programs, and records of the names, addresses, positions, and salaries of all persons employed in public service jobs (CETA, sec. 122(g)).

(b) Pursuant to § 29-70.203-6(b)(2), the recipient (except for records identified in § 29-70.203b-3(a)(2)) shall observe the following policy regarding confidentiality of personal records maintained for a project under a DOL grant or agreement involving other than public service employment:

(1) Names of individuals who are beneficiaries of opportunities under the project are considered public information. The recipient shall make other information regarding these project participants, applicants for participation, and their immediate families (which may be obtained from their application forms, interviews, tests, reports from public agencies or counselors, or any other source) available to the public to the same degree that it makes such information available about its own employees. Unless otherwise prohibited by law (e.g., The Family Educational Rights and Privacy Act of 1974 (20 U.S.C. 1232g)), the recipient may divulge information not normally made available to the public on the recipient's own employees without participant or applicant permission only as necessary for purposes related to grant or agreement performance or evaluation. Furthermore, such information may be made available only to: (i) Persons having responsibilities under the grant or agreement, including those furnishing services under a contract, subgrant, or subagreement; and (ii) governmental authorities to the extent necessary for the proper administration of the law.

(2) The names of all individuals employed by the recipient in staff positions under the project are considered public information. A recipient shall make other information on these employees available to the public in the same manner and to the same extent that such information is made available on its employees not involved in the federally supported activity.

§ 29-70.204 Waiver of "single" State agency requirements. [Reserved]

§ 29-70.205 Program income and interest earned.

§ 29-70.205-1 General.

The recipient of funds under a DOL grant or agreement shall account for program income earned from grant or agreement supported activities and other income (interest) in accordance with the standards in this section.

§ 29-70.205-2 Interest earned on advances.

Interest earned on advances of Federal funds (pending their disbursement for activities under the grant or agreement) is not program income. The recipient shall account for interest earned on advances in the following manner:

(a) *States or instrumentalities of a State.* In accordance with section 203 of the Intergovernmental Cooperation Act of 1968 (42 U.S.C. 4201 et seq.), a recipient which is a State or instrumentality of a State is not accountable to the DOL Agency for such interest. In addition, local governments receiving Federal grant funds under subgrants or subagreements from States may retain interest earned on such Federal funds.

(b) *Other recipients.* A local government receiving financial assistance directly as a recipient of a DOL grant or agreement and any other recipient shall remit any such interest earned to the DOL within 15 days after the end of the quarter in which the interest is earned.

§ 29-70.205-3 Program income.

Program income includes, but is not limited to, income from service fees, sale of commodities, use or rental fees, and royalties on patents and copyrights. The recipient shall use and account for program income in the following manner:

(a) *Sale of real and personal property.* The recipient shall handle proceeds from the sale of real and personal property, either provided by the DOL Agency or purchased in whole or in part with Federal funds, in accordance with § 29-70.215.

(b) *Royalties.* Except as otherwise required by § 29-70.215, or by terms of the grant or agreement, the recipient shall have no obligation to the DOL Agency with respect to royalties received as a result of copyrights on publications or other works developed or of patents on inventions conceived in performing under the grant or agreement. (See §§ 29-70.215-9 and 29-70.215a-9 for DOL standards relating to inventions, patents, and copyrights.)

(c) *Other program income.* The recipient shall retain all other program income earned during the period of the grant or agreement and, in accordance with the terms of the grant or agreement, shall:

(1) Add the income to funds committed to the project, and use the funds to further eligible program objectives; or

(2) Deduct the funds from the total project costs for the purpose of determining the net costs on which the DOL share of costs will be based; or

(3) Use the funds to finance the recipient matching requirement.

§ 29-70.205-4 Requirements for recipient earmarked revenues.

The recipient shall record the receipt and expenditure of revenues (such as taxes, special assessments, levies, and fines) as part of the transactions under a grant or agreement when the grant or agreement stipulates that such revenues are to be used for activities under the grant or agreement.

§ 29-70.205b Program income—CETA requirements.

The provisions of § 29-70.205 apply with the following exceptions:

(a) A recipient or subrecipient, during the grant or agreement period and for 2 years thereafter, shall apply any income generated under a Youth Community Conservation and Improvement Project (YCCIP) to costs of the project except that, if, at the end of the grant or agreement period the project is not continued, the recipient or subrecipient shall observe the requirements of paragraph (b).

(b) The recipient or subrecipient may use program income generated in an approved activity under CETA grants or agreements other than YCCIP during the grant or agreement period and for 2 years thereafter to carry out any CETA activity authorized under the former grant or agreement. The grant officer may require the recipient to account for the expenditure of such income for a period not to exceed 2 years from the expiration date of the Annual Plan (or grant, or agreement, as appropriate). Recipients shall require subrecipients to report the expenditure of such income. Any income still unexpended by any subrecipient 1 year from the expiration of financial assistance to the subrecipient shall be returned to the recipient to continue any CETA activity.

(c) Program income under CETA programs is also covered in the CETA program regulations at 20 CFR 676.36.

§ 29-70.206 Matching share.

§ 29-70.206-1 General.

The DOL Agency shall include any required recipient cash or in-kind contributions (cost sharing or matching share) in the grant or agreement document. This section provides criteria for determining the allowable cash and in-kind contributions made by a recipient, a subrecipient, or a third party, and procedures for application of the contributions to satisfy cost-sharing and matching requirements. It also prescribes methods for evaluating in-kind contributions. It supplements guidance set forth in Federal Management Circular (FMC) 73-3 with respect to cost sharing in federally sponsored research.

§ 29-70.206-2 Federal cash or in-kind contributions.

The recipient may not use Federal funds received under other Federal grants or agreements or property purchased with Federal funds to satisfy cost-sharing or matching requirements of a DOL grant or agreement unless the use of such funds for cost-sharing or matching is authorized by the Federal legislation under which the non-DOL funds were received (e.g., State and Local Fiscal Assistance Act, as amended, or Indian Self-Determination and Education Assistance Act).

§ 29-70.206-3 Matching share or cost-sharing standards.

(a) The cost-sharing or matching contribution may consist of:

(1) Charges incurred by the recipient as project costs including charges not requiring cash outlays during the grant or agreement period (such as depreciation and use charges for buildings and equipment).

(2) Project costs financed with cash contributed or donated to the recipient by non-Federal third parties.

(3) Project costs represented by services and real or personal property, or the use thereof, donated by non-Federal third parties.

(4) Project costs financed with Federal funds or property purchased with Federal funds in accordance with § 29-70.206-2.

(b) The recipient shall use cash and in-kind contributions as parts of its matching share or cost-sharing requirement under a DOL grant or agreement only if the contributions are permitted under paragraph (a) and if they meet all of the following criteria:

(1) Are verifiable from recipient records.

(2) Are not included as matching contributions for any other federally assisted project.

(3) Are necessary and reasonable for proper and efficient accomplishment of project objectives.

(4) Are the kinds of charges allowable under the applicable cost principles.

(5) Are not paid by the Federal Government under another financial assistance grant or agreement (except as provided in § 29-70.206-2).

(6) Are provided for in the approved grant or agreement or in DOL Agency program regulations.

§ 29-70.206-4 Valuation of in-kind contributions.

(a) *Recipient contributions.* The recipient shall value its in-kind contributions at the recipient's actual cost in

accordance with applicable cost principles.

(b) *Other in-kind contributions.* The recipient shall use the following criteria in establishing the value of in-kind contributions from third parties:

(1) *Volunteer services.* The recipient shall observe the following criteria in evaluating volunteer services:

(i) *Acceptable services and time allowed.* The recipient may accept volunteer services provided by any individual and may count each hour of any volunteered service for cost-sharing or matching purposes if the service benefits the approved project and is an integral and necessary part of the project.

(ii) *Rates for volunteer services.* (A) *General criteria.* The recipient shall value volunteer services at rates which are consistent with rates paid for similar work in the recipient's organization. Where the recipient has no similar skills in its organization, the recipient shall value the services at rates which are consistent with rates paid for similar work in the labor market in which the recipient is located.

(B) *Rates for volunteer services donated by other employers.* If an employer (other than the recipient) volunteers the services of an employee to perform needed services under a DOL grant or agreement, the recipient shall value these services at the employee's regular rate of pay (exclusive of fringe benefits and overhead costs) if these services are in the same skill for which the employee is normally paid. If the services are not in the same skill for which the employee is normally paid, the recipient shall determine the rates in accordance with criteria set forth in paragraph (A) of this section.

(2) *Property—expendable personal property.* Donated expendable personal property may include such items as expendable equipment, office supplies, laboratory supplies, or workshop and classroom supplies. The recipient shall assign values to such property for cost-sharing or matching purposes which are reasonable and which do not exceed the fair market value of the property at the time of donation.

(3) *Property—nonexpendable personal property, buildings, and land, or the use thereof.* (i) The recipient shall use the following methods in evaluating donated equipment, buildings, and land for cost-sharing or matching purposes:

(A) If the primary purpose of the grant or agreement is to assist the recipient in acquiring equipment, buildings, or land, or to otherwise provide a facility, the recipient may claim the total fair market value of the property.

(B) If the primary purpose of the grant or agreement is to support activities that require the use of equipment, buildings, or land on a temporary or part-time basis, the recipient may make depreciation or use charges for the equipment and buildings. The full value of equipment or other capital assets and the fair rental charges for land may be permitted, provided that the grant officer has approved the amounts in writing.

(ii) The recipient shall use its established accounting policies in determining the value of donated property except that:

(A) *Land and buildings.* The value of donated land and buildings may not exceed its fair market value at the time of donation to the recipient as established by an independent appraiser (such as a certified real property appraiser or General Services Administration representative) and certified by the recipient.

(B) *Nonexpendable personal property.* The value of donated nonexpendable personal property may not exceed the fair market value of equipment and property of the same age and condition at the time of donation.

(C) *Loaned equipment.* The value of loaned equipment may not exceed its fair rental value.

(D) *Use of space.* The value of donated space may not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately owned building in the same locality.

§ 29-70.206-5 Supporting records for third party in-kind contributions.

(a) The recipient shall document volunteer services used for matching or cost-sharing purposes. To the extent

feasible, the recipient shall use the same methods in maintaining supporting records for volunteer services that it uses in maintaining records on its employees.

(b) The recipient shall document the method used in determining the value of donated personal services, material, equipment, buildings, and land.

§ 29-70.207 Standards for grantee financial management systems.

§ 29-70.207-1 General.

This section prescribes DOL standards for financial management systems of recipients of DOL financial assistance under grants and agreements.

§ 29-70.207-2 Standards—financial management systems.

Each recipient shall establish and maintain a financial management system which provides for adequate control of grant or agreement funds and other assets; ensures the accuracy of financial data; and provides for operational efficiency and for internal controls to avoid conflict-of-interest situations and to prevent irregular transactions or activities. The recipient shall ensure that its financial management system meets the following standards:

(a) *Reporting.* The recipient's reporting procedures shall provide accurate, current, and complete disclosure of the financial results of each grant or agreement in accordance with reporting requirements of § 29-70.208. The recipient shall report on an accrual basis. A recipient whose records are not maintained on an accrual basis may develop accrual data for reports on the basis of an analysis of the documentation on hand. In such cases, the recipient's accounting process must provide sufficient information to compile data to satisfy the accrued expenditure reporting requirements and to demonstrate the link between the accrual data reports and the nonaccrual fiscal accounts; and the recipient shall retain all such documentation for audit purposes.

(b) *Records.* The recipient shall maintain records which identify adequately the source and application of funds for grant or agreement supported activities. The recipient shall ensure that the records systematically assemble information concerning Federal awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays, and income into balance sheet format for internal control purposes.

(c) *Control of assets.* The recipient shall maintain effective control over and accountability for all project funds, property, and other assets. The recipient shall safeguard assets and shall assure that they are used solely for authorized purposes.

(d) *Comparison of outlays with budget.* The recipient shall compare outlays with budgeted amounts for each grant or agreement; and, when required by performance reporting requirements of the grant or agreement, show the relation of financial information to performance data, including the production of unit cost data if appropriate.

(e) *Advance payments.* Whenever funds are advanced by the DOL, the recipient shall establish procedures to minimize the time elapsing between the transfer of funds from the U.S. Treasury and the disbursement by the recipient. If advances are made by the letter-of-credit method, the recipient shall make drawdowns as close as possible to the time of making disbursements. The recipient, in advancing funds to a contractor or subrecipient, shall require that the contractor or subrecipient conform to substantially the same standards that the DOL Agency requires of the recipient.

(f) *Allowable costs.* The recipient shall establish procedures for determining reasonableness, allowability, and allocability of costs in accordance with applicable cost principles (see § 29-70.103) and terms of the grant or agreement.

(g) *Source documentation.* The recipient shall support accounting records with source documentation such as canceled checks, paid bills, or contracts, subgrants, or subagreements awarded.

(h) *Audits.* (1) *General.* The recipient shall arrange for external or internal audits performed in accordance with "generally accepted audit standards" and DOL guidelines by individ-

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uals who are sufficiently independent of those who authorize the expenditure of Federal funds to ensure that any opinions, conclusions, or judgments regarding audit findings are valid and unbiased (see § 29-70.207-4(e)(1), (2), and (3)).

(2) *Audit purpose and scope.* The audits shall be performed to ascertain the effectiveness of the recipient's financial management, including internal procedures and controls established to meet terms and conditions of the grant or agreement. The auditors need not audit every grant or agreement, but shall make the audit on an organizationwide basis with an appropriate sampling of DOL grants and agreements. The audits shall be performed in accordance with the U.S. General Accounting Office's publication, "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions," to determine whether (i) financial operations are properly conducted; (ii) financial reports are fairly presented; and (iii) available information indicates that the recipient has complied with applicable laws, regulations, and administrative requirements in its use of Federal funds.

(3) *Frequency.* Frequency of audit shall depend on the nature, size, and complexity of the recipient's grant or agreement activities. Audits shall be conducted, on a continuing basis or at regularly scheduled intervals, usually annually, but no less frequently than every 2 years. If the DOL Office of Inspector General (OIG) conducts an audit, the recipient need not obtain an audit for the period audited by the DOL.

(4) *Relation to Federal audit.* The non-Federal audits do not limit the DOL right to conduct a Federal audit but may affect the frequency and scope of the Federal audit (see § 29-70.207-4(b)(2)).

(i) *Resolution of audit findings.* The recipient shall establish a systematic method to assure the timely and appropriate resolution of audit findings and recommendations, and shall furnish the OIG with a copy of each audit report and a statement regarding resolution of findings.

[44 FR 42923, July 20, 1979; 44 FR 48972, Aug. 21, 1979]

§ 29-70.207-3 Subrecipient standards.

(a) The recipient shall require each subrecipient to adopt the standards for financial management systems set forth in § 29-70.207-2, except for requirements regarding reporting forms and frequencies (paragraph (a)), letter-of-credit procedures (paragraph (e)), and audit (paragraph (h)).

(b)(1) The recipient shall conduct an independent audit of a sample of its subrecipients and contractors at least once every 2 years. The sample selected shall be coordinated with and approved by the OIG.

(2) The end of a Federal fiscal year shall be used as a common cut-off date for all subrecipients and contractors.

(3) The auditing in no way lessens the recipient's responsibilities to ensure that program activities and related costs incurred by its subrecipients and contractors are in compliance with DOL requirements.

§ 29-70.207-4 Federal and non-Federal audit requirements.

(a) *DOL audit responsibilities.* The OIG is responsible for the DOL audit program. It shall conduct or arrange for the conduct of Federal audit surveys or audits of recipient or subrecipient operations; and is responsible for determining the coverage, frequency, and priority of audits of any recipient. In addition to audits of existing, completed, or terminated grants or agreements, the OIG may conduct (or arrange for the conduct of) audit surveys to evaluate the accounting systems and internal controls of a prospective recipient prior to the award of a new grant or agreement. The OIG shall ensure that an audit of each recipient is conducted no less frequently than every 2 years, by using the audit report of a cognizant Federal agency, by accepting the non-Federal audit as an independent audit meeting DOL standards (see § 29-70.207-4(c)), or by conducting or arranging for the Federal audit. The OIG shall provide guidance to non-Federal audit staff concerning the proper application of Federal audit standards to an audit of a recipient or subrecipient.

(b) *Coordination of audit effort.* In planning the DOL audit effort, the OIG shall, in accordance with OMB Circular No. A-73—

(1) Establish and maintain cross-servicing arrangements with other Federal agencies and utilize audit reports of the cognizant Federal agency (as defined in OMB Circular No. A-73) when possible; and

(2) Consider using, in lieu of Federal audits, the non-Federal audits made of recipient and subrecipient activities if the audits meet all DOL standards set forth in paragraph (c).

(c) *Criteria for independent non-Federal audits meeting DOL standards.* The OIG shall consider a non-Federal audit to be an independent audit meeting the DOL standards if the audit is made of a State or local government and meets the following criteria—

(1) The audit is performed in accordance with "generally accepted audit standards," as defined in paragraph (d), and with audit guides issued by the DOL which define audit requirements with respect to DOL financially assisted activities;

(2) The audit is performed by an independent public accountant or by an independent examiner, as defined in § 29-70.207-4(e)(1) through (4); and

(3) The auditor submits a copy of each audit report to the OIG for review and determination of acceptability in lieu of a Federal audit at the same time that the report is submitted to the recipient; and makes audit work papers (which are complete, accurate, clear, understandable, neat, and pertinent to the report) available to the OIG, upon request, until all audit findings have been resolved by the DOL with respect to the recipient's grant or agreement (see § 29-70.203-3).

(d) *Generally accepted audit standards.* "Generally accepted audit standards" mean audit standards issued by the U.S. General Accounting Office entitled "Standards for Audit of Governmental Organizations, Programs, Activities and Functions," which incorporate the audit standards established by the American Institute of Certified Public Accountants.

(e) *Independent public accountant or examiner.* A public accountant means a certified public accountant or a licensed public accountant, licensed on or before December 31, 1970, who is certified or licensed by a regulatory authority of a State or other political subdivision of the United States. An examiner means an employee of a State or local government audit agency. The individual is "independent" if he or she—

(1) Is free of personal, external, and organizational impairments as set forth in Part III, Chapter 3 of "Standards for Audit of Governmental Organizations, Programs, Activities and Functions";

(2) Has no personal interest, directly or indirectly, in the financial affairs of the recipient being audited; and

(3) Does not perform an audit if he or she or the principal officer of the audit agency making the audit maintains accounting records being examined or reports to the officer responsible for such records; and

(4)(i) Is a State examiner auditing a State or State agency, who meets the requirements of paragraphs (e) (1), (2), and (3) of this section; and the principal officer of the State audit agency—(A) is elected by the citizens of the State; or (B) is elected or appointed by and reports to the State legislature or a committee thereof; or (C) is appointed by the Governor and is confirmed by and reports to the State legislature or a committee thereof; or

(ii) Is a local government examiner, auditing his or her local government, who meets the requirements of paragraphs (e) (1), (2), and (3) of this section; and the principal officer of the audit agency—(A) is elected by the citizens of the local government; or (B) is elected or appointed by and reports to the governing body of the local government; or (C) is appointed by the executive officer of the local government and reports to the governing body of the local government or a committee thereof; or

(iii) Is a public accountant who meets the requirements of paragraphs (e) (1), (2), and (3) of this section, and has been engaged to perform the audit by a State or local government audit agency. The OIG may also determine that a public accountant is independent if the public accountant is engaged

by a State or local government agency other than the audit agency.

(f) *Recipients other than State or local governments.* Except in extraordinary circumstances, the OIG will not consider non-Federal audits of other recipients to be independent audits meeting DOL standards which may be used in lieu of performing Federal audits.

§ 29-70.207a Standards for grantee financial management systems—special requirements, nonprofit organizations.

The standards set forth in § 29-70.207 apply except that Federal audits of recipients that are educational institutions are to be performed by the Federal agency specified in Federal Management Circular (FMC) 73-6, "Coordinating indirect cost rates and audit at educational institutions."

§ 29-70.207b Standards for grantee financial management systems—CETA requirements.

The standards governing recipient financial management systems set forth in § 29-70.207 apply to CETA recipients except that CETA recipients may also be required to participate in unified audits (see 20 CFR 676.34b) (CETA, secs. 103(a)(4)(A), 106(j), and 133).

§ 29-70.208 Financial reporting requirements.

§ 29-70.208-1 General.

The recipient shall use the standards, procedures, and forms prescribed by this section to report financial information to the DOL Agency; and, when letter-of-credit procedures are not used, to request advances or reimbursement.

§ 29-70.208-2 Forms and instructions.

Except as otherwise provided in § 29-70.208-4, the recipient shall use only the following forms in reporting financial information:

(a) *Financial Status Report (Standard Form (SF) 269).* (1) *Use.* For grants and agreements for nonconstruction projects, the recipient shall use SF 269, *Financial Status Report,* to report outlays, program income, and other financial information related to Federal funds authorized for the project unless the DOL has indicated in writing that other financial reporting forms (SF 272, *Federal Cash Transactions Report* (see § 29-70.208-2(b) or SF 270, *Request for Advance or Reimbursement* (see § 29-70.208-2(c)) provide adequate information. When SF 270, *Request for Advance or Reimbursement,* is used only for requesting advance funds, the recipient shall always submit a final *Financial Status Report* upon completion or termination of the grant or agreement. The recipient shall prepare the report on an accrual basis.

(2) *Frequency and due dates.* Unless otherwise prescribed by the DOL Agency on the basis of the size, complexity, or specific requirements of a particular project, the recipient shall submit the *Financial Status Report* quarterly during the period of the grant or agreement, and shall submit a final report upon completion or termination of the grant or agreement in accordance with instructions issued by the DOL Agency. The recipient shall prepare quarterly reports to coincide with the ending dates of Federal fiscal year quarters. Thus, if a recipient's grant or agreement begins after the beginning of a Federal fiscal year, a fifth report may be necessary to cover the grant or agreement period. The recipient shall submit quarterly reports no later than 30 calendar days after the end of each specified reporting period and annual or final reports no later than 90 calendar days after the ending of the period covered by the report. If unable to meet a reporting due date, the recipient shall explain the circumstances in writing to the grant officer, who may grant a written extension of the due date if circumstances warrant the delay.

(b) *Federal Cash Transactions Report (SF 272).* (1) *Use.* Each recipient shall submit SF 272, *Federal Cash Transactions Report,* if the DOL advances funds by Treasury check (or letter of credit unless the recipient is under the Letter of Credit—Treasury Regional Disbursing Office (RDO) system). (Under the RDO system, the recipient shall provide cash balance and disbursement information by forwarding an advance copy of each SF

183, *Request for Payment on Letter of Credit and Status of Funds Report*, to the DOL Agency.) The recipient shall use the "Remarks" section of the report to forecast Federal cash requirements; to report the amount of cash advances in excess of 3 days' requirements in the hands of subrecipients and actions which are being taken to reduce excess balances; and to report to the DOL Agency whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient by $5,000 or 5 percent of the amount of funds awarded under the grant or agreement, whichever is greater.

(2) *Frequency and due dates.* The recipient shall submit the *Federal Cash Transactions Report* each quarter except that recipients receiving advances totaling $1 million in a 12-month period shall submit the report monthly. The recipient shall submit the report so that it is received in the DOL Agency no more than 15 working days following the end of each reporting period.

(3) *Waivers.* A DOL Agency may waive the submission of the *Federal Cash Transactions Report* if advances to the recipient do not exceed $10,000 a month provided that the grant officer determines that the advances can be monitored through other forms authorized by this section or that the recipient's accounting controls are adequate to minimize excessive Federal advances.

(c) *Request for Advance or Reimbursement (SF-270).* When the DOL Agency does not use letter-of-credit procedures or predetermined advance methods to finance a grant or agreement and the primary purpose of the grant or agreement is not construction, the recipient shall use the SF 270, *Request for Advance or Reimbursement*, to request advance payments or reimbursements for costs which have been incurred. The recipient may also use this form (in lieu of SF 271, *Outlay Report and Request for Reimbursement for Construction Programs*) to request advance payments and reimbursements under grants and agreements awarded primarily for construction when the grant officer determines that the form provides adequate information. The recipient is authorized to submit requests for advance payments or reimbursements monthly.

(d) *Outlay Report and Request for Reimbursement for Construction Programs (SF 271).* (1) *Requests for advances or reimbursement by Treasury check.* The recipient shall submit requests for advances or reimbursement for grants and agreements for construction programs on SF 271 unless the grant officer has determined that the SF 270 (described in § 29-70.208-2(c)) is more appropriate. When requesting advances by Treasury check using SF 271, the recipient shall leave blank those items on the form which are applicable only when requesting reimbursement. The recipient is authorized to submit reports monthly.

(2) *Letter-of-credit and predetermined advance procedures.* If a construction grant or agreement is financed by letter-of-credit or predetermined advance procedures, the recipient shall not submit requests for payment to the DOL. The DOL Agency may determine that SF 269, *Financial Status Report*, should be used for reporting purposes. Unless otherwise authorized by the DOL Agency, the recipient shall submit this report to meet due dates and frequency prescribed for the *Financial Status Report* in § 29-70.208-2(a)(2).

[44 FR 42923, July 20, 1979; 44 FR 48972, Aug. 21, 1979]

§ 29-70.208-3 Detailed procedures.

The recipient shall observe the following procedures in making required reports:

(a) *Number of copies.* The recipient shall submit the original and two copies of required reports unless the DOL Agency waives the requirement for copies.

(b) *Reporting forms and formats.* For reporting purposes, the recipient shall use standard forms or reproduced copies of the forms which the DOL Agency obtains from the General Services Administration. When approved by the DOL Agency, the recipient may transmit the same information in machine usable format or by computer printouts in lieu of the forms.

(c) *Alterations permitted.* The recipient shall follow instructions on prescribed standard reporting forms. (The DOL Agency shall shade out any line item on the forms which is not needed for decision-making purposes.)

(d) *Computer outputs.* When it will expedite or contribute to more accurate reporting, the DOL Agency may provide computer outputs to the recipient.

(e) *Subrecipient reports.* The recipient is not required to use the forms prescribed by this section in obtaining financial information from subrecipients. Nevertheless, the recipient shall use forms which provide information that is readily transferable to reporting forms used by the recipient.

§ 29-70.208-4 Special reporting requirements.

Except as otherwise permitted by the following special procedures of this section, DOL Agencies shall observe reporting procedures and shall use only forms and instructions specified in § 29-70.208-2 and § 29-70.208-3 in obtaining recipient financial information:

(a) *Additional reporting—statutory or program requirements.* If applicable Federal statutes or program objectives require more frequent reporting or information not accommodated by the prescribed forms or procedures of this section, the DOL Agency shall:

(1) Issue instructions to the recipient, clarifying the additional requirements and requesting that the recipient insert the information in the "Remarks" section of the appropriate standard form; or

(2) If the "Remarks" section of the standard form cannot provide for the required information, the DOL Agency may impose additional requirements, (*Provided*, That, it has first obtained necessary clearances to impose the requirements in accordance with § 29-70.101(g)(3) or § 29-70.101(h), as appropriate.

(b) *Additional reporting—certain recipients.* If the recipient does not meet the financial management system requirements of § 29-70.207, or is otherwise subject to special requirements in accordance with § 29-70.105, the DOL Agency may require the recipient to submit reports more frequently or to provide more detail (or both) upon written notice to the recipient that additional requirements will be imposed until such time as the recipient meets the DOL Agency standards.

(c) *Requirements of OMB Circular No. A-40.* Whenever additional reporting requirements are to be imposed in accordance with § 29-70.208-4, the DOL Agency shall comply with all reports clearance requirements of OMB Circular No. A-40, as revised.

§ 29-70.208b Financial reporting—CETA requirements.

CETA recipients shall use the standards, procedures, and forms prescribed by this section except as otherwise required by 20 CFR 676.44.

§ 29-70.209 Monitoring and reporting of program performance.

§ 29-70.209-1 General.

Each recipient shall observe the procedures set forth in this section in monitoring and reporting performance of approved project activities.

§ 29-70.209-2 Recipient monitoring responsibilities.

The recipient shall constantly monitor performance of grant or agreement supported activities to assure that time schedules are being met, projected work units by time periods are being accomplished, and other performance goals are being achieved.

§ 29-70.209-3 Reporting requirements.

(a) *Content of report.* The recipient shall submit a performance (technical) report to the DOL Agency which briefly presents the following information for each project activity (in accordance with detailed instructions of the DOL Agency):

(1) A comparison of actual accomplishments to established goals for the period and any findings related to monitoring efforts. If the output can be readily quantified, the recipient shall relate quantitative data to cost data for computation of unit costs.

(2) Reasons for slippage if established goals have not been met.

(3) Other pertinent information including analyses and explanations of any cost overruns or high unit costs.

(b) *Frequency.* Except as provided in paragraphs (b) (1), (2), and (3) of this section and in § 29-70.209-4, or as otherwise required by the DOL Agency, the recipient shall submit performance reports in the same frequency and with the same due dates as those prescribed for the *Financial Status Report* in § 29-70.208-2(a)(2). The recipient shall submit a final performance report at the completion or termination of each grant or agreement in accordance with instructions of the DOL Agency. If the *Financial Status Report* is not required, the recipient shall prepare the required financial report and the performance report in the same frequencies to cover the same time periods so that DOL officials may compare performance under the grant or agreement with costs incurred. Unless specifically requested by the DOL Agency, the recipient need not submit performance reports with financial reports:

(1) If the DOL Agency requires the recipient to submit a performance report with a continuation or renewal application;

(2) If the DOL Agency requests financial information on a fiscal year basis, but requires performance reports on other than a fiscal year basis; or

(3) If the DOL Agency determines that on-site technical inspections and certified percentage-of-completion data will be sufficient to evaluate construction projects.

§ 29-70.209-4 Significant developments between scheduled reporting dates.

Between the regularly scheduled reporting dates, the recipient shall inform the grant officer in writing as soon as the recipient becomes aware of:

(a) Problems, delays, or adverse conditions which may materially affect the recipient's ability to meet planned time schedules, accomplish projected work units by established time periods, or achieve other performance goals. This notice shall include a statement of any remedial actions taken or contemplated, and of any assistance needed from the DOL Agency to resolve the situation.

(b) Favorable developments or events which will enable the recipient to meet time schedules and performance goals sooner than anticipated or to produce more work units in established time periods.

§ 29-70.209-5 Budget revisions.

If any performance review conducted by the recipient discloses the need for a change in budget estimates, the recipient shall submit a written request for budget revision to the grant officer in accordance with criteria established in § 29-70.211.

§ 29-70.209-6 Site visits.

The recipient shall cooperate fully with authorized DOL representatives who shall make visits as frequently as practicable to:

(a) Review program accomplishments and management control systems; and

(b) Provide such technical assistance as may be required.

§ 29-70.209b Monitoring and reporting of program performance—CETA requirements.

(a) *Monitoring.* Each CETA recipient shall: (1) Establish criteria by which to measure its performance and the performance of its contractors and subrecipients; (2) systematically review performance based on established criteria; (3) assess findings and identify any problems at least quarterly; (4) promptly take any necessary remedial actions; and (5) use findings in subsequent program planning and in selecting contractors and subrecipients. A recipient which is a prime sponsor shall establish an independent monitoring unit to ensure objectivity in the monitoring effort. Detailed procedures are set forth in 20 CFR 676.22, 20 CFR 676.34, and 20 CFR 676.75 (CETA, sec. 103(a)(4)(A) and sec. 121q).

(b) *Reporting.* Each CETA recipient shall submit performance reports in accordance with detailed procedures set forth in 20 CFR 676.44 (CETA, sec. 127(d)).

§ 29-70.210 Grant or agreement payment requirements.

§ 29-70.210-1 General.

This section sets forth DOL's methods of making payments to the recipient of a DOL grant or agreement. A DOL Agency shall make payments to the recipient (subject to conditions imposed by this section and terms of the grant or agreement) through advances either by letter of credit or by Treasury check, or through reimbursement by Treasury check upon request of a recipient.

§ 29-70.210-2 Payment methods.

(a) *Standards for determining payment method.* The DOL Agency shall use the standards in this section to determine whether a recipient is eligible to receive advance payments; and, if eligible, whether payments will be made by letter of credit or by Treasury check. If a recipient is ineligible for advance payments, the DOL Agency shall resolve any problems relating to scheduling reimbursements, and shall determine whether an initial working capital advance will be needed whenever the recipient is required to finance its own operations.

(b) *Advance payments.* DOL Agency officials shall limit advances under either of the following methods to actual and immediate cash needs:

(1) *Letter of credit.* A DOL Agency shall use the letter-of-credit funding method whenever all of the following conditions exist:

(i) The recipient has or will have a continuing relationship with the DOL Agency for a period of no less than 12 months;

(ii) The recipient will receive at least $120,000 in advances during that period;

(iii) The recipient has established, or demonstrated to the DOL Agency its willingness and ability to establish and maintain procedures that will minimize the time elapsing between the transfer of funds to, and their disbursement by, the recipient;

(iv) The recipient's financial management system meets the standards for fund control and accountability prescribed in § 29-70.207; and

(v) The recipient has developed, or has demonstrated to the DOL Agency its willingness and ability to develop and maintain procedures for advances to its subrecipients or contractors which conform substantially to the standards of timing and amount imposed on the recipient by the DOL Agency.

(2) *Treasury check.* A DOL Agency shall use Treasury check procedures in advancing funds when the recipient meets the criteria in § 29-70.210-2(b)(1) except for those in paragraphs (b)(1)(i) or (b)(1)(ii). To request cash advances, the recipient shall submit its projected cash requirements on SF-270, *Request for Advance or Reimbursement,* to the DOL Agency in accordance with procedures set forth in § 29-70.208-2 and the terms and conditions of the grant or agreement.

(c) *Reimbursement by Treasury check.* A DOL Agency shall make payments by reimbursing the recipient by Treasury check in the following circumstances:

(1) When a recipient does not meet the criteria in paragraph (b) of this section needed to receive advance payments; or

(2) When the major portion of the program is accomplished through private market financing or Federal loans, or when the DOL financial assistance constitutes a minor portion of the program.

(3) The recipient is authorized to submit its requests for payment monthly using SF-270, *Request for Advance or Reimbursement.* The DOL Agency shall make payment within 30 days after receipt of the billing unless the billing is improper in form or substance. Payment will cover the approved Federal share of the recipient's cash disbursements made under the grant or agreement since the previous payment.

(d) *Working capital advance procedures.* If the recipient cannot meet the criteria for advance payments, as described in paragraph (b) of this section, and the DOL Agency has determined that reimbursement, as described in paragraph (c), is not feasible because the recipient lacks sufficient working capital, the DOL Agency may make arrangements to provide cash on

a working capital advance basis. Under this procedure, the DOL Agency shall advance cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the recipient's disbursing cycle. Thereafter, the DOL Agency shall reimburse the recipient for disbursements made in accordance with procedures of paragraph (c) of this section. The recipient shall submit SF-270, *Request for Advance or Reimbursement*, to request the working capital advance funds and reimbursement. The DOL Agency shall make payments by Treasury check.

(e) *Optional payment methods—construction.* Notwithstanding paragraphs (a), (b), and (c) of this section, when the principal purpose of a DOL grant or agreement is construction, the DOL Agency may determine which payment method is appropriate for the particular grant or agreement.

(f) *Waiver of payment method requirements.* There may be instances when the DOL Agency determines that use of letter-of-credit procedures (required for grants and agreements meeting criteria of § 29-70.210-2(b)(1)) are inappropriate for a specific grant or agreement. Upon written request of the DOL Agency, the Department of the Treasury will consider requests for a waiver of the requirement on a case-by-case basis.

[44 FR 42923, July 20, 1979; 44 FR 48972, Aug. 21, 1979]

§ 29-70.210-3 Payment condition.

The DOL Agency shall stipulate in the grant or agreement the method of payment. If a recipient receiving advance payments does not comply with standards of timing and amounts set forth in § 29-70.210-2(b), the DOL Agency may, after notice to the recipient, discontinue the advance payment method and make payments by reimbursement (see § 29-70.105).

§ 29-70.210-4 Consolidation of advances.

When letter-of-credit procedures are used, the DOL shall, to the extent feasible, issue a single or consolidated letter of credit to the recipient to cover anticipated cash needs for all DOL grants and agreements. When advances are made by Treasury check, DOL Agencies shall, to the extent feasible, consolidate advances for all DOL grants and agreements with the recipient.

§ 29-70.210-5 Withholding of payments.

(a) Unless otherwise required by law, DOL Agencies shall not withhold payments for proper charges made by a recipient at any time during the period of the grant or agreement unless:

(1) The recipient has failed to carry out project objectives, or to comply with grant or agreement conditions; or

(2) The recipient is indebted to the United States, and collection of the indebtedness will not impair accomplishment of the objectives of any project or program sponsored by the DOL.

(b) If a situation described in § 29-70.210-5(a) (1) or (2) exists, the DOL Agency may, upon reasonable notice, inform the recipient that payments will not be made for obligations incurred by the recipient after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

§ 29-70.210-6 Joint funding.

Payment procedures for grants and agreements which are jointly funded with another Federal agency are prescribed in OMB Circular No. A-111.

§ 29-70.210b Grant or agreement payment—CETA requirements.

The DOL Agency may withhold otherwise payable funds to recover amounts expended in any fiscal year in violation of CETA statutory or regulatory requirements, or terms or conditions of the grant or agreement. In addition to requirements of § 29-70.210-5(b), the DOL Agency may, if the withholding results from fraud or other misspending of funds and if the funds are being withheld from a prime sponsor, direct the prime sponsor to continue the program as approved in the current grant or agreement using non-CETA funds. If such direction is given, the DOL Agency shall, at the same time, inform the prime sponsor that failure to carry out the program as directed will result in the Department's enforcing its directive by civil

action unless the prime sponsor elects to terminate participation under the Act. Such an election would constitute grounds for the DOL Agency to terminate the grant or agreement for cause in accordance with procedures in § 29-70.213 (CETA, sec. 106(g)).

§ 29-70.211 Modifications and budget revision procedures.

§ 29-70.211-1 General.

This section provides criteria and procedures to be followed by the recipient in reporting financial plan deviations, and in requesting approval when changes are contemplated in the budget, project objectives, or other provisions of the approved grant or agreement. This section also provides procedures to be followed by the DOL Agency in modifying a grant or agreement.

§ 29-70.211-2 Grant or agreement budget.

The budget (approved financial plan for carrying out the purposes of the grant or agreement) shall include the Federal share, and may include the non-Federal share if required in the DOL Agency application instructions. The recipient shall relate the budget changes to performance to provide for project evaluation.

§ 29-70.211-3 Grant or agreement changes requiring DOL approval.

(a) *Nonconstruction grants and agreements.* The recipient promptly shall notify the grant officer and shall request prior written approval when it seeks a modification of the grant or agreement for any of the following reasons:

(1) Changes in the approved scope or objectives of the project supported by the grant or agreement.

(2) Changes which may affect the DOL cost or the grant or agreement period.

(3) Proposed transfer of amounts budgeted for indirect costs to absorb increases in direct costs.

(4) Proposed addition of items requiring approval in accordance with applicable Federal cost principles.

(5) The Federal share of the grant or agreement exceeds $100,000, and the cumulative amount of transfers among direct cost categories (or among functions and activities when budgeted separately for award) exceeds or is expected to exceed 5 percent of the total budget as last approved by the grant officer. The recipient shall not transfer any funds which will cause DOL appropriated funds to be used for purposes other than those intended.

(6) In grants or agreements awarded for the purpose of providing employment and/or training, the revision involves the transfer of amounts previously budgeted for direct payments to trainees or other participants to other categories of expense.

(b) *Construction grants and agreements.* The recipient shall notify the grant officer and request prior written approval whenever:

(1) The revision results from changes in the approved scope or the objectives of the project; or

(2) The revision increases the budgeted amounts of DOL funds needed to complete the project.

(c) *Grants and agreements including construction and nonconstruction work.* The recipient shall notify the grant officer and shall request prior written approval if the revision involves the transfer of funds between construction and nonconstruction work.

§ 29-70.211-4 Grant or agreement changes not requiring prior DOL approval.

The recipient need not obtain prior DOL approval for other budget changes. For example, the recipient may use non-DOL funds to further project objectives over and above the recipient minimum share included in the budget of a grant or agreement; or may transfer amounts budgeted for direct costs to absorb those increases in indirect costs approved by the Department.

§ 29-70.211-5 Modification procedures.

(a) *Recipient requests for modification.* The recipient may request grant officer approval by letter for items added to a budget which must have prior approval in accordance with applicable cost principles (see § 29-70.211-3(a)(4)). All other requests in-

volving revisions identified in § 29-70.211-3 require a formal modification. These requests shall be accompanied by a revised SF 424, *FEDERAL ASSISTANCE*, budget forms used in the original grant or agreement (revised to show the proposed changes), and other information required by the grant officer.

(b) *Approval of requests.* Within 30 calendar days from date of receipt of a request for approval, the grant officer shall review the request and notify the recipient as to whether the request has been approved or disapproved. If the request is still under consideration at the end of 30 calendar days, the grant officer shall notify the recipient as to when the decision is expected to be made. If approved (except for requests pursuant to § 29-70.211-3(a)(4)), the changes to the grant or agreement shall be shown in a formal modification, bilaterally executed by the grant officer and the recipient or their authorized representatives. If the effective date of the change is not shown in the modification, the date of execution by the grant officer shall be the effective date. The grant officer shall number modifications consecutively and shall retain a copy of all documents pertaining to a modification (e.g., approved revised budgets) in the official grant or agreement file.

(c) *DOL-initiated modifications.* (1) In addition to modifications issued in response to proposed changes identified in § 29-70.211-3, the grant officer shall issue modifications as needed to add new conditions, terms, or assurances required by Federal law or regulation. These modifications must be bilaterally executed by the grant officer and the recipient unless an applicable statute (or an amendment thereto), of itself, changes requirements of existing grants or agreements.

(2) The grant officer may unilaterally issue modifications under the following circumstances:

(i) To incorporate administrative changes (changes which do not affect the substantive rights of the DOL Agency or the recipient) into the grant or agreement. Examples of these changes include designating a different project officer, or a change in office location to which reports are to be sent; or adding dollar increments in grants or agreements which are incrementally funded; or

(ii) When specifically authorized to do so by applicable Federal law or regulations, or by terms of the grant or agreement, to make changes in the DOL cost; or in the period, scope, or objectives of the grant or agreement—changes which normally require a bilaterally executed modification. For example, the grant officer, in closing out, or in suspending or terminating a grant or agreement for cause, may (under specific, stated circumstances) unilaterally change principal provisions of the grant or agreement (see § 29-70.212 and § 29-70.213); or

(iii) When there has been a change in any Federal statute, regulation, Executive Order, or other Federal law relevant to the financial assistance provided under the grant or agreement. In order to implement this policy, all DOL Agency grants and agreements entered into on or after October 1, 1979, shall contain a provision that, as a condition for receipt of financial assistance, the recipient agrees to accept a unilateral modification by the grant officer whenever there has been a change in any Federal statute, regulation, Executive Order, or other Federal law, which, as determined by the DOL Agency, is relevant to the financial assistance provided under the grant or agreement.

(d) *Timing of modifications.* The grant officer may modify a grant or agreement:

(1) At any time prior to final payment if payments are made to the recipient by reimbursement.

(2) At any time prior to closeout if advance payments are made by letter of credit or by Treasury check.

(3) Subsequent to final payment or closeout (as appropriate) only to reflect the results of final audits, disputes appeals, or resolution of other unresolved matters identified upon final payment or at closeout.

§ 29-70.211-6 Notification of excess Federal funds.

The recipient of either a construction or non-construction grant or agreement shall promptly notify the

grant officer whenever the amount of authorized Federal funds is expected to exceed recipient needs by more than $5,000 or 5 percent of the Federal grant or agreement, whichever is greater (see § 29-70.208-2(b)). If the recipient submits applications for additional funding of continuing grants or agreements, this notification is not required.

§ 29-70.211a Modifications and budget revision procedures—special requirements, nonprofit organizations.

Unless the grant or agreement approved by the DOL Agency provides for the transfer of the substantive, programmatic work, the recipient shall request written grant officer approval prior to transferring DOL funds (by subgrant, subcontract, or subagreement) for the purpose of performing such work. A formal modification, prepared in accordance with § 29-70.211-5 will be prepared to reflect the transfer of funds and activities.

§ 29-70.211b Modifications and budget revision procedures—CETA requirements.

Procedural details for modifying CETA grants and agreements are set forth in the CETA regulations at 20 CFR 676.16.

§ 29-70.212 Closeout procedures. [Reserved]

§ 29-70.213 Suspension and termination of grants and agreements; debarment. [Reserved]

§ 29-70.214 Applying for Federal financial assistance.

§ 29-70.214-1 General.

This section provides procedures to be followed by an applicant or recipient in applying for financial assistance under a DOL grant or agreement; prescribes standard forms to be used by an applicant or recipient that is a State, local, or federally recognized Indian tribal government; and provides assurances to be included in applications submitted by an applicant or recipient that is a nonprofit organization. A recipient shall ensure that application forms used by a prospective subrecipient include the assurances which are appropriate to the type of subrecipient, i.e., State, local, or federally recognized Indian tribal government or nonprofit organization.

§ 29-70.214-2 Clearinghouse review—OMB Circular No. A-95.

(a) OMB Circular No. A-95 provides procedures to ensure that Federal agencies and State and local governments cooperate in evaluating, reviewing, and coordinating Federal and federally assisted programs. DOL programs subject to the A-95 requirements are identified in Appendix 1 of the current Catalog of Federal Domestic Assistance. A DOL Agency having programs covered under the circular shall inform potential applicants for assistance of requirements to ensure early contact between an applicant and appropriate clearinghouses.

(b) Each applicant for financial assistance under a covered program shall notify appropriate State and areawide clearinghouses of its intent to apply; and provide the clearinghouses with an opportunity to review its completed application in accordance with DOL Agency instructions. The A-95 notification requirements also apply to proposed significant modifications to a project under a covered program or to applications to renew a project under a covered program.

(c) The DOL Agency shall consider any comments or recommendations of the clearinghouses in evaluating applications for projects under covered programs.

§ 29-70.214-3 Forms for applying for DOL financial assistance—jointly funded grants or agreements.

In applying for financial assistance under a jointly funded grant or agreement (a grant or agreement funded by more than one Federal agency), an applicant or recipient shall use forms or modifications to forms prescribed in OMB Circular No. A-111.

§ 29-70.214-4 Standard forms—State, local, and federally recognized Indian tribal governments.

State, local, and federally recognized Indian tribal governments shall use the following forms in applying for fi-

nancial assistance under DOL grants and agreements:

(a) *Preapplication for Federal assistance.* (1) When required by the DOL Agency, a potential applicant shall submit a preapplication to the DOL (using SF 424 and related forms shown as Exhibit M-1 of Attachment M to OMB Circular No. A-102); and to clearinghouses if subject to OMB Circular No. A-95 procedures. Submission of a preapplication indicates an intent to apply for Federal financial assistance under a DOL grant or agreement. DOL Agencies will ordinarily use the preapplication to—

(i) Establish communications with potential applicants;

(ii) Determine a potential applicant's eligibility;

(iii) Determine how well a proposed project can compete with those of others; and

(iv) Eliminate any proposal which has little or no chance to be funded before the potential applicant incurs the expenditures involved in preparing an application.

(2) The potential applicant shall submit the preapplication forms whenever the DOL financial assistance for construction, land acquisition, or land development projects will exceed $100,000. If specifically required by the DOL Agency, the potential applicant shall also submit the forms when the DOL financial assistance will amount to $100,000 or less; or for projects other than projects for construction, land acquisition, or land development. In addition, potential applicants may use a preapplication form even when not specifically required by the DOL Agency.

(3) *Notice of preapplication review action.* DOL Agencies shall use the "Notice of Preapplication Review Action," shown as Exhibit M-2 of Attachment M to OMB Circular No. A-102, to inform a potential applicant of the results of the DOL review of a submitted preapplication. The responsible grant officer shall, within 45 days of the receipt of a preapplication, send the notice or inform the potential applicant in writing as to when he or she expects to complete the review.

(b) *Application for Federal assistance (nonconstruction programs).* Except as provided in paragraphs (c) and (d) of this section, the applicant shall use the "Application for Federal Assistance (Nonconstruction Programs)," shown as Exhibit M-3 of Attachment M to OMB Circular No. A-102, in applying for a grant or agreement.

(c) *Application for Federal assistance (for construction programs).* The applicant shall use the "Application for Federal Assistance (For Construction Programs)," shown as Exhibit M-4 of Attachment M to OMB Circular No. A-102, in applying for a grant or agreement whose major purpose involves construction, land acquisition, or land development except when the "Application for Federal Assistance—Short Form" (see § 29-70.214-4(d)) is used.

(d) *Application for Federal assistance (short form).* The applicant shall use the "Application for Federal Assistance (Short Form)," shown as Exhibit M-5 of Attachment M to OMB Circular No. A-102, in applying for a single-purpose or a one-time grant or agreement for less than $10,000 which does not require clearinghouse approval, an environmental impact statement, or the relocation of persons, businesses, or farms; and may use the form for applying for grants or agreements of larger amounts if its use has been approved by the DOL Agency.

[44 FR 42923, July 20, 1979; 44 FR 48973, Aug. 21, 1979]

§ 29-70.214a Applying for Federal financial assistance—Special requirements, nonprofit organizations.

The DOL Agency shall prescribe the forms to be used by an applicant or potential applicant in applying for financial assistance except that SF 424, FEDERAL ASSISTANCE shall be used as the face sheet for applications and preapplications for grants or agreements under programs covered by Part I, Attachment A, of OMB Circular No. A-95. In addition, the DOL Agency shall ensure that the following assurances are included as a part of any prescribed application for financial assistance:

(a) *Nonconstruction programs.* The applicant (or recipient) hereby assures

and certifies that it will comply with applicable regulations, including 41 CFR Part 29-70, and applicable policies, guidelines, and requirements, including OMB Circulars Nos. A-95 and A-110, and with applicable Federal cost principles as they relate to the application for, and acceptance and use of Federal funds for this federally assisted project. Also the applicant (or recipient) assures and certifies, with respect to the grant or agreement, that:

(1) It possesses legal authority to apply for the grant or agreement; that a resolution, motion, or similar action has been duly adopted or passed as an official act of the applicant's governing body, authorizing the filing of the application, including all understandings and assurances contained therein, and directing and authorizing the person identified as the official representative of the applicant to act in connection with the application and to provide such additional information as may be required.

(2) It will comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and, in accordance with Title VI of that Act, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the applicant receives Federal financial assistance; and will immediately take any measures necessary to effectuate this agreement.

(3) It will comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) prohibiting employment discrimination where (1) the primary purpose of a grant or agreement is to provide employment or (2) discriminatory employment practices will result in unequal treatment of persons who are or should be benefiting from the grant-aided activity.

(4) It will comply with requirements of Title II and Title III of the Uniform Relocation Assistance and Real Property Acquisitions Act of 1970 (42 U.S.C. 4601 et seq.) which provides for fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs.

(5) It will comply with the provisions of the Hatch Act which limit the political activity of State and local government employees.

(6) It will comply with the minimum wage and maximum hours provisions of the Federal Fair Labor Standards Act (29 U.S.C. 201 et seq.) as they apply to employees of institutions of higher education, hospitals, and other nonprofit organizations as defined in these regulations.

(7) It will establish safeguards to prohibit employees from using their positions for a purpose that is or gives the appearance of being motivated by a desire for private gain for themselves or others, particularly those with whom they have family, business, or other ties.

(8) It will give the Department of Labor and the Comptroller General, through any authorized representative, the access to and the right to examine all records, books, papers, or documents related to the grant or agreement, including the records of contractors, subcontractors, and subrecipients performing under the grant or agreement.

(9) It will comply with all requirements imposed by the Department of Labor concerning special requirements of law, program requirements, and other administrative requirements.

(10) It will ensure, pursuant to Executive Order 11738, that the facilities under its ownership, lease or supervision which shall be utilized in the accomplishment of the project are not listed on the Environmental Protection Agency's (EPA) List of Violating Facilities and that it will notify the Department of Labor of the receipt of any communication from the Director of the EPA Office of Federal Activities indicating that a facility to be used in the project is under consideration for listing by the EPA.

(11) It will assist the Department of Labor in its compliance with Section 106 of the National Historic Preservation Act of 1966 (16 U.S.C. 470), Executive Order 11593, and the Archeological and Historic Preservation Act of 1966 (16 U.S.C. 469a-1 et seq.) by (a) consulting with the State Historic Preservation Officer on the conduct of investigations, as necessary, to identify

properties listed in or eligible for inclusion in the National Register of Historic Places that are subject to adverse effects (see 36 CFR Part 800.8) by the recipient's activity, and notifying the Department of Labor of the existence of any such properties, and by (b) complying with any requirements established by the Department of Labor to avoid or mitigate adverse effects upon such properties.

(12) It will comply, to the extent applicable, with all requirements of Section 114 of the Clean Air Act (42 U.S.C. 1857, et seq.), and section 308 of the Federal Water Pollution Control Act (33 U.S.C. 1251, et seq.), respectively, or any amendments to the Acts, relating to inspection, monitoring, entry, reports, and information, as well as other requirements specified in Section 114 and Section 308 of the Air Act and Water Act, respectively, and all regulations and guidelines issued thereunder.

(13) It will comply with the flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4106 and 4128) which requires the purchase of flood insurance, on and after March 2, 1974, in communities where such insurance is available, as a condition for the receipt of any Federal financial assistance for acquisition or construction purposes with respect to insurable property within an area that has been identified by the Secretary of the Department of Housing and Urban Development as an area having special flood hazards.

The term "Federal financial assistance" includes any form of loan, grant, guaranty, insurance payment, rebate, subsidy, disaster assistance loan or grant, or any other form of direct or indirect Federal assistance.

(14) It will comply with Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and with all requirements imposed by the Department of Labor pursuant to the regulations of the Department of Health, Education, and Welfare (45 CFR Part 85) promulgated under the foregoing statute. The applicant agrees that, in accordance with the foregoing requirements, no otherwise qualified handicapped person, by reason of handicap, shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance, and assures that it will take any measures necessary to effectuate this agreement.

(15) It will comply, to the extent applicable, with Title IX of the Education Amendments of 1972 (20 U.S.C. 1681, et seq.) which provides that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.

(16) It will include the equal employment opportunity clause prescribed by Executive Order 11246, as amended, and will require that its subrecipients include the clause, in all contracts or subcontracts which have or are expected to have an aggregate value within a 12-month period exceeding $10,000, in accordance with Department of Labor regulations at 41 CFR Part 60-1.4.

(17) If the grant or agreement is under a statute providing wage standards for such work, it will include, and will require that its subrecipients include, the provision covering the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-332) set forth in 29 CFR 5.5(c) and (e) in any nonexempt nonconstruction contract or subcontract which involves the employment of mechanics and laborers (including watchmen, guards, apprentices, and trainees) if the contract exceeds $2500.

(18) It will comply with standards for environmental quality control that may be prescribed pursuant to responsibilities of the Federal Government under the National Environmental Policy Act of 1969 (42 U.S.C. 4321) and Executive Order 11514, Protection and Enhancement of Environmental Quality as amended by Executive Order 11991.

(b) *Construction programs.* The applicant (or recipient) hereby assures and certifies that it will comply with applicable regulations, including 41 CFR 29-70, and applicable policies, guidelines, and requirements, includ-

ing OMB Circulars Nos. A-95 and A-110 and with applicable Federal cost principles as they relate to the application for, and acceptance and use of Federal funds for this federally assisted project. Also the applicant (or recipient) assures and certifies, with respect to the grant or agreement, that:

(1) It possesses legal authority to apply for the grant, and to finance and construct the proposed facilities; a resolution, motion, or similar action has been duly adopted or passed as an official act of the applicant's governing body, authorizing the filing of the application, including all understandings and assurances contained therein, and directing and authorizing the person identified as the official representative of the applicant to act in connection with the application and to provide such additional information as may be required.

(2) It will comply with the provisions of Executive Order 11988, relating to evaluation of flood hazards, and Executive Order 12088, relating to the prevention, control, and abatement of water pollution.

(3) It will have sufficient funds available to meet the non-Federal share of the cost for construction projects. Sufficient funds will be available when construction is completed to assure effective operation and maintenance of the facility for the purposes constructed.

(4) It will obtain approval by the Department of Labor Agency of the final working drawings and specifications before the project is advertised or placed on the market for bidding; it will construct the project, or cause it to be constructed, to final completion in accordance with the application and approved plans and specifications; it will submit to the Department of Labor Agency for prior approval, changes that alter the costs of the project, use of space, or functional layout; it will not enter into a construction contract(s) for the project or undertake other activities until the conditions of the construction grant program(s) have been met.

(5) It will comply with the provisions of the Hatch Act which limit the political activity of State and local government employees.

(6) It will provide and maintain competent and adequate architectural engineering supervision and inspection at the construction site to ensure that the completed work conforms with the approved plans and specifications; it will furnish progress reports and such other information as the Department of Labor Agency may require.

(7) It will operate and maintain the facility in accordance with such minimum standards as may be required or prescribed by the applicable Federal, State, and local agencies for the maintenance and operation of such facilities.

(8) It will give the Department of Labor and the Comptroller General, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the grant or agreement, including the records of contractors and subcontractors performing under the grant or agreement.

(9) It will comply with the Architectural Barriers Act of 1968, (42 U.S.C. 4151 *et seq.*) and the standards issued pursuant to the Act. The applicant will be responsible for seeing that facilities are designed and constructed in accordance with applicable standards and for conducting inspections to ensure compliance with these specifications by the contractor.

(10) It will cause work on the project to be commenced within a reasonable time after receipt of notification from the Department of Labor Agency that funds have been approved; and will prosecute the project to completion with reasonable diligence.

(11) It will not dispose of or encumber its title or other interests in the site and facilities during the period of Federal interest or while the Government holds bonds, whichever is the longer.

(12) It will comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and, in accordance with Title VI of that Act and Department of Labor regulations at 29 CFR 31, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for

which the applicant receives Federal financial assistance and will immediately take any measures necessary to effectuate this agreement. If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the applicant, this assurance shall obligate the applicant, or in the case of any transfer of such property, any transferee, for the period during which the real property or structure is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(13) It will establish safeguards to prohibit employees from using their positions for a purpose that is or gives the appearance of being motivated by a desire for private gain for themselves or others, particularly those with whom they have family, business, or other ties.

(14) It will comply with the requirements of Title II and Title III of the Uniform Relocation Assistance and Real Property Acquisitions Act of 1970 (42 U.S.C. 4601 et seq.) which provides for fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs.

(15) It will comply with all requirements imposed by the Department of Labor concerning special requirements of law, program requirements, and other administrative requirements.

(16) It will comply with the minimum wage and maximum hours provisions of the Federal Fair Labor Standards Act (29 U.S.C. 201), as they apply to employees of institutions of higher education, hospitals, and other nonprofit organizations as defined in these regulations.

(17) It will ensure, pursuant to Executive Order 11738, that the facilities under its ownership, lease, or supervision which shall be utilized in the accomplishment of the project, are not listed on the Environmental Protection Agency's (EPA) List of Violating Facilities; and it will notify the Department of Labor of the receipt of any communication from the Director of the EPA Office of Federal Activities indicating that a facility to be utilized in the project is under consideration for listing by the EPA.

(18) It will comply with the flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4106 and 4128). Section 102(a) requires, on and after March 2, 1974, the purchase of flood insurance in communities where such insurance is available as a condition for the receipt of any Federal financial assistance for construction or acquisition purposes for use in any area that has been identified by the Secretary of the Department of Housing and Urban Development as an area having special flood hazards. The phrase "Federal financial assistance" includes any form of loan, grant, guaranty, insurance payment, rebate, subsidy, disaster assistance loan or grant, or any other form of direct or indirect Federal assistance.

(19) It will assist the Department of Labor in its compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), Executive Order 11593, and the Archeological and Historic Preservation Act of 1966 (16 U.S.C. 469a-1 et seq.) by (a) consulting with the State Historic Preservation Officer on the conduct of investigations, as necessary, to identify properties listed in or eligible for inclusion in the National Register of Historic Places that are subject to adverse effects (see 36 CFR Part 800.8) by the activity, and notifying the Department of Labor of the existence of any such properties, and by (b) complying with all requirements established by the Department of Labor to avoid or mitigate adverse effects upon such properties.

(20) It will comply with Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented by Department of Labor Regulations (41 CFR Part 60). This requires the inclusion of the equal employment opportunity clause as prescribed in 41 CFR 60-1.4(b) and the Standard Federal Equal Employment Opportunity Construction Contract Specifications required in 41 CFR 60-4.3(c) in all nonexempt contracts and subcontracts involving federally assisted construction. The requirement applies to contracts which have or are expected to have an aggregate value

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within a 12-month period exceeding $10,000.

(21) When required by the Federal program legislation, it will ensure that laborers and mechanics receive at least the wages determined in accordance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) as supplemented by Department of Labor regulations (29 CFR Part 5). This applies to all construction contracts of more than $2,000 awarded by a recipient or subrecipient. Under this Act, contractors and subcontractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors and subcontractors shall be required to pay wages not less than once per week. The recipient or subrecipient shall place a copy of the current prevailing wage determination issued by the Department of Labor and the provisions set forth in 29 CFR 5.5(a) in each solicitation, and the award of a contract or subcontract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Department of Labor Agency.

(22) It will comply with the Copeland "Anti-Kickback" Act (18 U.S.C. 874). This applies to all construction, alteration, and repair financed in whole or in part by loans or grants from the United States. It provides that each recipient, subrecipient, contractor, and subcontractor, or any other person shall be prohibited from inducing by any means, any person employed in the construction, completion, or repair of public works, to give up any part of the compensation to which he or she is otherwise entitled. The recipient shall report all suspected or reported violations to the Department of Labor Agency. When Federal program legislation provides that the Davis-Bacon labor standards apply, the recipient ensures that contractors and subcontractors with contracts or subcontracts in excess of $2,000 shall comply with Department of Labor regulations at 29 CFR Part 3.

(23) If the grant or agreement is under a statute providing wage standards for such work, it will comply with the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333). It will include, and will require that its subrecipients include, the provision set forth in Department of Labor regulations at 29 CFR 5.5(c) in each construction, alteration, or repair contract awarded in excess of $2,000 which involves the employment of mechanics or laborers.

(24) It will comply with the provision of Executive Order 11990, relating to protection of wetlands as follows: (i) avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands; (ii) avoid direct or indirect support of new construction in wetlands, wherever there is a practicable alternative; (iii) design, construct, operate, and maintain the project by taking actions both to minimize the destruction, loss, or degradation of wetlands and to preserve and enhance the natural and beneficial values of wetlands, when there is no practicable alternative; and (iv) for projects covered by Section 104(h) of the Housing and Community Development Act of 1977, assume the responsibilities under provisions in Section 2 and 5 of this Order, if the applicant has also assumed with respect to such projects, all of the responsibilities for environmental review, decisionmaking and action pursuant to the National Environmental Policy Act of 1969, as amended.

(25) It will comply with the provisions of Executive Order 11988, relating to floodplain management as follows: (i) avoid to the extent possible the long and short term adverse impacts associated with the occupancy and modification of floodplains; (ii) avoid direct or indirect support of flood plain development, wherever there is a practicable alternative; (iii) design, construct, operate, and maintain the project by taking actions to minimize potential harm to or within the floodplain; and (iv) for projects covered by Section 104(h) of the Housing and Community Development Act of 1977, assume the responsibilities under provisions 2(a) of this Order, if the applicant has also assumed with respect to such projects, all of the responsibilities for environmental

review, decisionmaking and action pursuant to the National Environmental Policy Act of 1969, as amended.

(26) It will comply with standards for environmental quality control that may be prescribed pursuant to reponsibilities of the Federal Government under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and Executive Order 11514, Protection and Enhancement of Environmental Quality, as amended by Executive Order 11991.

[44 FR 42923, July 20, 1979; 44 FR 48973, Aug. 21, 1979, as amended at 45 FR 82830, Dec. 16, 1980]

§ 29-70.214b Applying for Federal financial assistance—CETA requirements.

Procedures and forms for applying for financial assistance under CETA grants or agreements may be found at 20 CFR, Subpart A of Part 676; and Parts 677 through 695.

§ 29-70.215 Property management standards.

§ 29-70.215-1 General.

This section prescribes standards governing the management of property furnished by the DOL or acquired in whole or in part with financial assistance awarded by a DOL Agency, or property whose cost is charged to a project in support of a DOL grant or agreement. A recipient may follow its own property management policies and procedures provided that it observes the requirements of this section.

§ 29-70.215-2 Real property.

The following requirements concerning title to, and the use and disposition of real property funded wholly or in part by financial assistance awarded by a DOL Agency, apply to recipients of DOL grants and agreements.

(a) *Title.* Title to real property shall vest in the recipient subject to the conditions given in paragraphs (b) and (c) of this section.

(b) *Use.* The recipient shall use the real property for the authorized purpose of the original grant or agreement as long as needed. When the recipient determines that the property is no longer needed for originally authorized purposes, the recipient may request in writing that the grant officer authorize the recipient to use the property for the following purposes:

(1) Activities under other Federal grants or agreements for assistance-type projects.

(2) Activities under non-Federal projects which have purposes consistent with those authorized for support by the DOL.

(c) *Disposition.* When the real property is no longer needed for purposes specified in paragraph (b), the recipient shall request disposition instructions from the grant officer (or from the grant officer of the successor Federal agency if control of the property regarding use and disposition has been transferred to another agency in accordance with paragraph (b)(1)). The grant officer shall observe the following rules in issuing disposition instructions:

(1) The recipient may be permitted to retain title to the property with Federal restrictions removed after compensating the DOL for its fair share computed by applying the DOL percentage of participation in the cost of the original project to the current fair market value of the property as determined by licensed appraisers; or

(2) The recipient may be directed to sell the property under guidelines provided by the DOL Agency and to pay the DOL an amount computed by applying the DOL percentage of participation in the cost of the original project to the proceeds from the sale after deducting actual and reasonable selling and fix-up expenses, if any. The grant officer may require that sales procedures be subject to DOL approval to ensure that competition is obtained to the extent practicable and that the sale results in the highest possible return; or

(3) The recipient may be directed to transfer title to the property to the Federal Government. In such cases, the recipient shall be entitled to compensation computed by applying the recipient's percentage of participation in the cost of the original project to the current fair market value of the property as determined by licensed appraisers.

[44 FR 42923, July 20, 1979; 44 FR 48973, Aug. 21, 1979]

§ 29-70.215-3 Federally owned nonexpendable personal property.

(a) *Title.* Title to federally owned property remains vested in the Federal Government.

(b) *Use of federally owned nonexpendable personal property.* The recipient shall use the property for the authorized purposes of the grant or agreement and, during the grant or agreement period, the recipient may make the property available for other activities in accordance with § 29-70.215-6. The recipient shall submit an annual inventory listing of federally owned property in its custody to the DOL Agency.

(c) *Disposition.* Upon completion of the grant or agreement or when the property is no longer needed for work under the grant or agreement, the recipient shall so inform the DOL Agency. The grant officer shall request that DOL property officers review the need for further utilization of the property by the DOL. If the DOL has no further need for the property, it shall be declared excess and reported to the General Services Administration. The DOL Agency shall issue appropriate disposition instructions to the recipient. Under no circumstances shall a recipient sell federally owned property.

§ 29-70.215-4 Exempt nonexpendable personal property.

(a) *Title.* When statutory authority exists (e.g., Sec. 7(b) of the Federal Grant and Cooperative Agreement Act of 1977—41 U.S.C. 501), title to nonexpendable personal property acquired with grant or agreement funds may vest in the recipient upon acquisition if the grant officer determines that to do so is in furtherance of DOL objectives.

(b) *Use and disposition.* When title to such property vests in the recipient, the recipient shall have no further obligation or accountability to the DOL unless the property is subject to the special requirements regarding transfer of title which are set forth in § 29-70.215-5(f).

§ 29-70.215-5 Other nonexpendable personal property.

(a) *Special acquisition restriction.* If it is in the DOL's best interest, the grant officer shall require that nonexpendable personal property needed for projects under DOL grants or agreements be obtained by lease rather than purchase. A prospective recipient shall be given written notice of this restriction either in the solicitation or by other public notice prior to grant or agreement award.

(b) *Acquisitions requiring prior approval.* The recipient shall obtain prior approval from the grant officer for all purchases of nonexpendable personal property, that is, property having a unit acquisition cost of $500 or more and a useful life of more than 2 years. The recipient may request approval by itemizing such purchases in the grant or agreement application prior to award or by submitting written requests for approval of such purchases during the grant or agreement period.

(c) *Title.* When the recipient purchases nonexempt, nonexpendable personal property with grant or agreement funds, title shall vest in the recipient subject to the conditions set forth in § 29-70.215-5(d), (e), and (f), and in § 29-70.215-6. (Section 29-70.215-5(f) provides special restrictions regarding title, use, and disposition of specific, identified property.)

(d) *Use of property to which recipient has title.* Unless otherwise provided in the grant or agreement or in documents authorizing acquisition (in accordance with paragraph (f)), the recipient shall use the property in the project for which it was acquired as long as it is needed, whether or not the project continues to be supported by DOL funds. When no longer needed for the original project, the recipient shall use the property for other federally assisted activities in the following order of priority:

(1) Activities receiving financial assistance from the DOL.

(2) Activities receiving financial assistance from other Federal agencies.

(e) *Disposition of property to which recipient has title.* When the property is no longer needed for activities speci-

fied in § 29-70.215-5(d), the recipient may use the property for other activities or may dispose of the property in accordance with the following standards:

(1) *Property with a unit acquisition cost of less than $1,000.* The recipient may use the property for other activities without reimbursement to the DOL or may sell the property and retain the proceeds.

(2) *Property with a unit acquisition cost of $1,000 or more.* Unless otherwise provided in the grant or agreement—

(i) The recipient may retain the property for other uses: *Provided,* That compensation is made to the DOL (or to the successor Federal agency if control of the property has been transferred to another agency in accordance with paragraph (d)(2)). The recipient shall compute amounts due the Department by applying the percentage of DOL participation in the cost of the original grant or agreement under which the property was obtained to the current fair market value of the property; or

(ii) If the recipient has no need for the property and the property has further use value, the recipient shall report the item or items to the DOL on Standard Form (SF) 120, "Report of Excess Personal Property," for disposition instructions. The DOL shall determine whether the property can be used to meet other DOL needs. If no need exists in the Department, the DOL shall report the availability of the property to the General Services Administration in accordance with Federal Property Management Regulations (41 CFR Part 101-43) to determine whether other Federal agencies have a need for the property. The grant officer shall then issue instructions to the recipient within 120 calendar days from the date of receipt of the SF 120, and the following procedures shall govern:

(A) If so instructed, or if DOL disposition instructions are not issued within the 120 calendar days, the recipient shall sell the property. The recipient shall compute the DOL share by applying, against the sales proceeds, the percentage of DOL participation in the cost of the grant or agreement under which the property was purchased. To cover selling and handling expenses, the recipient may deduct and retain from the DOL share $100 or 10 percent of the sales proceeds, whichever is greater. The recipient shall remit the adjusted amount to the DOL.

(B) If the recipient is instructed to ship the property elsewhere, the recipient will be reimbursed by the benefiting Federal agency in an amount that is computed by applying to the current fair market value of the property, the percentage of the recipient's participation in the cost of the grant or agreement under which the property was purchased and by adding any reasonable diposition costs incurred including shipping or iterim storage costs.

(C) If the recipient is instructed to otherwise dispose of the property, the recipient shall be reimbursed by the DOL for costs incurred in its disposition.

(f) *Property subject to title transfer.* For items of nonexpendable personal property having a unit acquisition cost of $1,000 or more, the grant officer may require the recipient to transfer title to the property to the Federal Government or to a non-Federal third party named by the grant officer when such party is eligible under existing statutes to be furnished the property. This will normally be done only when the activity for which the property was acquired is transferred to another recipient, or when the property is no longer needed by the present recipient and the grant officer has determined that such property would be difficult or costly to replace. The right to require transfer of title shall be subject to the following standards:

(1) The property shall have been specifically identified as being subject to title transfer in the grant or agreement; or, if after award, at the time that written authority was given to a recipient to acquire such property.

(2) In order to exercise the right, the DOL Agency shall issue disposition instructions to the recipient not later than 120 calendar days after the end of Federal support for the project or the activities for which the property was acquired. If instructions are not

issued within that time, the Department's right shall lapse, and the recipient shall apply the standards set forth in § 29-70.215-5(d) and (e)(2).

(3) If the DOL Agency orders title to be transferred to the Federal Government, the property shall be subject to the provisions for federally owned nonexpendable personal property given in § 29-70.215-3.

(4) If the recipient transfers title either to the Federal Government or to a non-Federal third party, the recipient shall be reimbursed with an amount which is computed by applying, to the current fair market value of the property, the percentage of recipient participation in the cost of the grant or agreement under which the property was purchased plus any reasonable disposition costs incurred including shipping or interim storage costs. Reimbursement shall be made by the benefiting Federal agency or by the benefiting non-Federal third party, as appropriate.

[44 FR 42923, July 20, 1979, as amended at 45 FR 82830, Dec. 16, 1980]

§ 29-70.215-6 Shared use of nonexpendable personal property.

During the time that nonexempt, nonexpendable personal property is held for project purposes in connection with the grant or agreement under which it was acquired, the recipient shall make it available for other uses if such uses will not interfere with work under the grant or agreement for which the property was acquired. The recipient shall give first preference for such shared use to other DOL projects; second preference, to financially assisted projects of other Federal agencies; and third preference, to non-Federal uses which have purposes consistent with those authorized for financial assistance by the DOL. The recipient shall obtain prior approval from the grant officer for shared use on third preference and other non-Federal uses. The grant officer shall determine whether user charges are appropriate.

§ 29-70.215-7 Property management standards for nonexpendable personal property.

The recipient shall observe the following minimum Federal standards in managing nonexpendable personal property:

(a) The recipient may use its own standards in managing nonexpendable personal property which is exempt under § 29-70.215-4 and not subject to special requirements set forth in § 29-70.215-5(f). For all other nonexpendable personal property, the recipient shall maintain accurate property records which include:

(1) A description of the property;

(2) An identification number, such as the manufacturer's serial number, manufacturer's model number, Federal stock number, national stock number, or other identification number;

(3) Source of the property (e.g., name of commercial source, excess, surplus property, or Federal Government) and grant or agreement number;

(4) Information as to whether title vests in the recipient or the Federal Government;

(5) Acquisiton date (or date received if the property was furnished by the Federal government);

(6) For property not furnished by the Federal Government, percentage (as of the end of the budget year) of Federal participation in the cost of the project for which the property was acquired;

(7) Location, use, and condition of property, and the date this information was obtained;

(8) Unit acquisition cost; and

(9) Ultimate disposition data, including date of disposition and selling price or the method used to determine current fair market value if the DOL was compensated for its share.

(b) The recipient shall ensure that property owned by the Federal Government is marked to indicate Federal ownership.

(c) The recipient shall take a physical inventory of such property and reconcile the results with the property records at least once every 2 years (or each year for federally owned proper-

ty in accordance with § 29-70.215-3(b)). The recipient shall investigate any difference between quantities determined by the physical inspection and those shown in the accounting records and determine the causes of difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the property.

(d) The recipient shall maintain a control system which ensures adequate safeguards to prevent property damage, loss, or theft, and shall investigate and document any damage to or loss or theft of nonexpendable personal property. If the property is federally owned, the recipient shall promptly notify the grant officer, in writing, concerning the damage, loss, or theft.

(e) The recipient shall implement adequate maintenance procedures to keep the property in good condition.

(f) When authorized or required to sell the property, the recipient shall establish proper sales procedures which provide for competition to the extent practicable and result in the highest possible return.

(g) The recipient shall retain property records in accordance with § 29-70.203.

§ 29-70.215-8 Expendable personal property.

(a) Title to expendable personal property acquired for use under the grant or agreement shall vest in the recipient subject to the disposition restrictions set forth in paragraph (b) of this section.

(b) The recipient shall maintain records sufficient to determine the amount of unused expendable personal property on hand at the expiration date or upon termination or completion of the grant or agreement. If there is an inventory of unused expendable personal property exceeding $1,000 in total aggregate current fair market value at the expiration date or upon termination or completion, and if the property is not needed for any other federally financially assisted project, the recipient may retain the property for use on nonfederally assisted activities, or sell it. Whether retained or sold, the recipient shall compensate the DOL as follows: The amount shall be computed by multiplying the current fair market value of the property (if retained by the recipient) or the proceeds from sale of the property (if sold) by the percentage of DOL participation in the costs of the grant or agreement and by deducting and retaining 10 percent of any sales proceeds.

§ 29-70.215-9 Intangible personal property.

(a) *Inventions and patents.* If any project produces patentable items, patent rights, processes, or inventions in the course of work under a DOL grant or agreement, the recipient shall report the fact promptly and fully to the grant officer. Unless there is a prior agreement between the recipient and the DOL Agency on these matters, the DOL Agency shall determine whether to seek protection on the invention or discovery. The DOL Agency shall determine how the rights in the invention or discovery, including rights under any patent issued thereon, will be allocated and administered in order to protect the public interest consistent with the "Government Patent Policy" (President's Memorandum for Heads of Executive Departments and Agencies, August 23, 1971, and Statement of Government Patent Policy as printed in 36 FR 16889).

(b) *Copyrights.* The following copyright policy shall apply:

(1) Unless otherwise provided in terms of the grant or agreement, when copyrightable material is developed in the course of or under a DOL grant or agreement, the author or the recipient organization which developed the work is free to copyright the material or to permit others to do so.

(2) If any material developed in the course of or under a DOL grant or agreement (or a recipient contract, subgrant, or subagreement) is copyrighted, the DOL shall have a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, and otherwise use, and to authorize others to use, the work for Government purposes.

§ 29-70.215-10 Excess personal property.

(a) A recipient may obtain Federal excess property for use in federally financially assisted projects, *Provided*, That, the recipient (other than a federally recognized Indian tribal government) pays to the Government from grant funds 25 percent of the original acquisition cost of the property.

(b) Title to the property vests in a recipient who has paid the 25 percent of cost for the property. Such a recipient shall use the property in the manner prescribed for nonexpendable personal property (§ 29-70.215-5(d)), and shall account for the property in accordance with § 29-70.215-7. When such property is no longer needed for activities specified in § 29-70.215-5(d), the recipient may, regardless of whether the unit cost of the property exceeds $1,000, use the property for other activities without reimbursement to the DOL or may sell the property and retain the proceeds.

(c) Title to excess property obtained by a recipient which is a federally recognized Indian tribal government remains vested in the Federal Government. The recipient shall use and dispose of the property in accordance with requirements for federally owned nonexpendable personal property prescribed in § 29-70.215-3.

§ 29-70.215a Property management standards—special requirements, nonprofit organizations.

§ 29-70.215a-1 Special acquisition and disposition restrictions—nonexempt nonexpendable personal property.

(a) If it is in the Government's best interest, the grant officer may require that nonexpendable personal property be obtained by lease rather than by purchase (see § 29-70.215-5(a)).

(b) Alternatively, the grant officer may obtain the consent of a prospective recipient during negotiations to sell nonexpendable personal property purchased under the grant or agreement at the end of the grant or agreement period and to remit to the DOL that part of the proceeds which represents the percentage of DOL participation in the grant or agreement less a negotiated percentage for selling and handling costs. A prospective recipient shall be given notice regarding these special restrictions, and the special restrictions and disposition restrictions negotiated pursuant to this paragraph must be included as a condition in the award document.

(c) The recipient shall follow the use and disposition requirements for nonexempt nonexpendable personal property set forth at § 29-70.215-5 (d) and (e) unless otherwise provided, pursuant to § 29-70.215a-1(b), in the grant or agreement.

§ 29-70.215a-2 Copyrights.

The provisions of § 29-70.215-9(b)(2) do not apply to grants or agreements for educating or training students in a particular field or specialized area.

§ 29-70.216 Procurement standards; required provisions for recipient contracts.

[45 FR 82830, Dec. 16, 1980]

§ 29-70.216-1 Purpose and applicability.

(a) This section provides minimum Federal standards for procurement systems, procedures, and contract provisions used by a DOL recipient (or subrecipient—see § 29-70.101(b)(2)) in obtaining supplies, equipment, construction, and other services (including research and development) needed to carry out a grant or agreement where the costs will be either a direct charge to the grant or agreement or will be counted in satisfying a matching requirement. The recipient shall ensure that its contractors apply to their procurement those elements of this section which are required to be passed through to the contractor to enable the recipient to be in compliance with Federal standards, e.g., provisions required by § 29-70.216-13.

(b) Except as otherwise stated, this section does not apply to the award of, or to provisions required in subgrants or subagreements awarded to eligible entities described in § 29-70.101(b) to carry out a part of the substantive programmatic work of the grant.

(c) Section 29-70.216-13 prescribes provisions which the recipient must include in its contracts.

[45 FR 82830, Dec. 16, 1980]

§ 29-70.216-2 Recipient's procurement responsibilities.

These standards shall not relieve the recipient of contractual or administrative responsibilities under its contracts. As the responsible authority for the successful accomplishment of a project undertaken pursuant to a grant or agreement, the recipient shall be responsible for all aspects of administering procurements in support of its grant or agreement including—Soliciting offers and bids, evaluating responses, selecting contractors, and awarding contracts; handling disputes, claims, and protests of award; and handling all other matters of a contractual nature in accordance with good administrative practice, sound business judgment, Federal requirements, and applicable State and local laws. The recipient shall refer matters concerning violation of law to the Federal, State, or local authority which has proper jurisdiction. This does not prevent the recipient (or subrecipient through the recipient) from seeking advice from the DOL Agency concerning contractual issues. A DOL official shall not substitute his or her judgment for that of a recipient unless the matter is primarily a Federal concern.

[45 FR 82830, Dec. 16, 1980]

§ 29-70.216-3 Procurement systems and procedures.

If a grant or agreement provides for or allows procurement, the recipient may use its own procurement systems and procedures which reflect applicable State and local laws, rules, and regulations to the extent that the systems and procedures do not conflict with the DOL standards set forth in this section; applicable Federal statutes, Executive Orders, or regulations; or terms of the grant or agreement. To the extent feasible, DOL Agency officials shall assist the recipient to improve recipient procurement capabilities by providing technical assistance, training, publications, and other aid.

[45 FR 82830, Dec. 16, 1980]

§ 29-70.216-4 Procurement system reviews.

(a) A DOL Agency may, in accordance with standards and guidelines issued or approved by the Office of Federal Procurement Policy (OFPP), review a recipient's (or a prospective recipient's) procurement system. Reviews should be undertaken if:

(1)(i) There is likely to be a continuing relationship with a recipient; or

(ii) The recipient is to use a substantial amount of the Federal assistance provided for procurement; and

(2) A current procurement system certification or report of findings resulting from another Federal agency review is not available. (Unless there are specific, urgent reasons for doing otherwise, DOL Agencies will accept the findings or certification of another Federal agency for a period of 24 months from the date of the certification or report.)

(b) The purposes of making the review are:

(1) To determine whether a recipient's (or prospective recipient's) procurement system and operations meet the standards of this section and other acceptable criteria established by the OFPP in its review standards and guidelines, such as provisions of the Model Procurement Code for State and Local Governments developed by the American Bar Association;

(2) If a recipient's (or prospective recipient's) procurement system and operations meet the OFPP standards, to certify approval of the procurement system. Certification of the system will exempt the recipient's or prospective recipient's procurement under a DOL grant or agreement from prior DOL approvals required by § 29-70.216-6 for a period of 24 months from the certification date. This does not relieve the recipient from the Federal procedural requirements set forth in § 29-70.216-8; and

(3) If a recipient's (or prospective recipient's) procurement system and operations do not meet the OFPP standards, to prepare a report on deficiencies identified during the review, and to the extent feasible, provide technical assistance to remedy shortcomings.

(c) Upon completing a procurement system review, the DOL Agency shall provide a copy of the certification or the report of findings to the recipient (or prospective recipient) and a copy to the Office of the Assistant Secre-

tary for Administration and Management (OASAM) for further dissemination and coordination with the OFPP and other Federal agencies.

[45 FR 82830, Dec. 16, 1980]

§ 29-70.216-5 DOL reviews—contractor selection protests.

(a) If a complaint is filed or a protest is made concerning the recipient's contractor selection activities, the recipient shall attempt to resolve the complaint or protest in accordance with its established procedures.

(b) A DOL Agency shall review a complaint or protest regarding recipient contractor selection procedures only if the complainant furnishes evidence that:

(1) All administrative remedies of the recipient have been exhausted (a decision by a recipient procurement appeals board or a determination by the head of a recipient procurement office would be considered evidence); and

(2) The complaint involves:

(i) A violation of Federal law or regulations (Complaints which involve violations of State or local law shall be under the jurisdiction of State or local authorities.);

(ii) A violation of the recipient's protest procedures; or

(iii) Failure by the recipient to review a complaint or protest.

[45 FR 82831, Dec. 16, 1980]

§ 29-70.216-6 Required prior grant officer approvals.

(a) The recipient need not obtain prior grant officer review and approval of proposed contracts and related procurement documents such as requests for proposals and invitations for bids if the DOL Agency certifies approval of the recipient's procurement system and operations following a DOL review or by accepting a current certification by another Federal agency (see § 29-70.216-4).

(b) A recipient whose procurement system is not currently certified shall obtain prior grant officer review and approval of the following proposed contracts and related documents, such as requests for proposals and invitations for bids, under the following circumstances:

(1) The procurement is expected to exceed $10,000 and is to be awarded without obtaining competition, except in cases of public exigency or emergency pursuant to § 29-70.216-9(d)(2);

(2) The procurement is expected to exceed $10,000 and, in response to the solicitation, only one bid or offer has been received (see § 29-70.216-9(d));

(3) The procurement is expected to exceed $10,000 and specifies a "brand name" product; or

(4) The recipient's procurement procedures or operations do not meet the standards of this section. In this circumstance, the DOL Agency shall notify the recipient concerning the deficiency, and shall provide a copy of the notification to the Office of Federal Procurement Policy.

[45 FR 82831, Dec. 16, 1980]

§ 29-70.216-7 Recipient code of conduct.

The recipient shall avoid conflicts of interest, real or apparent, by observing the following requirements:

(a) The recipient shall maintain a written code or written standards of conduct which will govern the performance of its officers, employees, or agents in contracting with or otherwise procuring supplies, equipment, construction, or services with Federal funds under a DOL grant or agreement. These standards shall provide that no officer, employee, or agent shall:

(1) Solicit or accept gratuities, favors, or anything of monetary value from suppliers or potential suppliers, including subcontractors under recipient contracts; or

(2) Participate in the selection, award, or administration of a procurement supported by DOL funds (subject to this section) where, to the individual's knowledge, any of the following has a financial or other substantive interest in any organization which may be considered for award:

(i) The officer, employee, or agent;

(ii) Any member of his or her immediate family;

(iii) His or her partner; or

(iv) A person or organization which employs, or is about to employ, any of the above.

(b) To the extent permitted by State or local law or regulations, recipient standards shall provide for penalties, sanctions, or other disciplinary actions (such as suspension, termination, or civil action to recover money damages) to be applied for grant or agreement related violations of law or established standards of conduct by recipient officers, employees, or agents, or by contractors or their agents.

[45 FR 82831, Dec. 16, 1980]

§ 29-70.216-8 Procedural requirements.

The recipient shall establish procurement procedures which provide for the following minimum requirements:

(a) *Procurement alternatives.* The recipient shall review proposed procurement actions to consider consolidating or breaking out requirements for greater economy and to avoid purchasing unnecessary or duplicative items; and, where appropriate, shall analyze lease versus purchase or other alternatives to determine which alternative provides for the best use of Federal funds. State and local government recipients are urged to enter into intergovernmental agreements for procurement or uses of common goods and services.

(b) *Small, minority, and women's businesses, and labor surplus area suppliers.* (1) The recipient shall ensure that small, minority, and women's businesses are used as sources of supplies, equipment, construction, and services whenever possible by:

(i) Establishing and maintaining solicitation mailing lists which include small, minority, and women's businesses;

(ii) Soliciting small, minority, and women's businesses whenever they are potential sources;

(iii) When economically feasible, dividing total requirements into smaller units to permit maximum participation by small, minority, and women's businesses;

(iv) If the requirement permits, establishing delivery schedules which will encourage small, minority, and women's businesses to participate;

(v) When needed, using the services and assistance of the Small Business Administration, the Minority Business Development Agency in the Department of Commerce, and the Community Services Administration.

(2) The recipient shall require that any contractor performing under its grant or agreement take the above affirmative steps with respect to the use of small, minority, and women's businesses as sources of supplies, equipment, construction, and services.

(3) The recipient is also encouraged to utilize sources located in areas designated as labor surplus areas by the Secretary of Labor.

(c) *Selection procedures*—(1) *Competition requirements.* Except as otherwise authorized by Federal law (see § 29-70.216-8(c)(2)), the recipient shall conduct all procurement transactions, regardless of dollar amount or method used (formal advertising or negotiation), in a manner that provides for maximum open and free competition, and shall use no procedures which restrict or eliminate competition. The extent of competition sought shall be consistent with the dollar amount of the award. Examples of factors which might be considered restrictive include, but are not limited to: (i) Imposition of unreasonable requirements on a potential supplier in order to qualify to do business with a recipient such as unnecessary experience or bonding requirements; (ii) organizational conflicts of interest; or (iii) noncompetitive practices among potential suppliers.

(2) *Federal statutes authorizing preferential treatment.* A recipient may use preferential procurement procedures if, and to the extent that, they are prescribed or authorized by applicable Federal statute or Executive Order.

(i) The following Federal laws, either specifically or by intent, provide authority for a recipient to use grant or agreement funds to benefit specific ethnic or target population groups or specific geographic areas:

(A) Section 7(b)(2) of the Indian Self-Determination and Education Assistance Act requires that any Act authorizing Federal contracts with or grants to Indian organizations or for

the benefit of Indians shall require to the greatest extent feasible—

(2) preference in the award of subcontracts and subgrants . . . shall be given to Indian organizations and to Indian-owned economic enterprises . . .

(B) The Comprehensive Employment and Training Act (CETA) provides for certain programs which have, as their primary purpose, job opportunities for target population groups in specific geographic areas (see § 29-70.216b and 20 CFR 676.23). (CETA, sec. 123(1))

(ii) If a recipient is authorized, in accordance with § 29-70.216-8(c)(2)(i), to use preferential procurement, the DOL Agency may require that the recipient submit proposed procedures for prior review and approval. In addition, the DOL Agency shall periodically review such procedures to ensure that they—

(A) Conform to Federal, State, and local law, and applicable regulations;

(B) Promote program goals and comply with the Federal statute authorizing the procedures;

(C) Provide for recipient cost or price analysis to ensure that costs are reasonable and that Federal funds are expended in accordance with good business practice; and

(D) Provide for maximum competition within the authorized limitations unless a noncompetitive procurement can be justified in accordance with § 29-70.216-9(d).

(iii) Approval of a grant or agreement application which includes planned preferential procurement practices shall constitute approval of use of the procurement practices.

(3) *Recipient contractor selection procedures.* The recipient shall maintain written contractor selection procedures under which the solicitation document for either a formally advertised (sealed bid) or a competitively negotiated procurement shall:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. In competitive procurements, the description shall not contain features which unduly restrict competition. The description may include a statement concerning the qualitative nature of the material, product, or service being procured and, when necessary, shall set forth the minimum essential characteristics and standards to which it must conform to satisfy its intended use. The recipient shall avoid using detailed product specifications if at all possible. When it is impractical or uneconomical to develop a clear and accurate description of the technical requirements, the recipient may use a "brand name or equal" description to define performance or other salient requirements of a procurement. The solicitation shall clearly state the specific features of a name brand which an offeror's or bidder's material, product, or service must possess to be considered acceptable.

(ii) Clearly set forth all requirements which offerors or bidders must fulfill and all other factors which the recipient will use in evaluating bids or proposals. In this regard, a recipient that is a State (or State agency or organization, if applicable) shall require that a bidder or offeror furnish information demonstrating compliance with any applicable mandatory standard or policy relating to energy efficiency and conservation which is contained in the State energy conservation plan issued pursuant to the Energy Policy and Conservation Act (Pub. L. 94-163).

(d) *Contract award.* The recipient shall make an award only to a responsible contractor as defined in § 29-70.102.

[45 FR 82832, Dec. 16, 1980]

§ 29-70.216-9 Methods of procurement.

The recipient shall accomplish its procurement by using, as appropriate to the dollar amount, nature of the procurement, and available offerors or bidders, one of the following procurement methods:

(a) *Small purchase method.* The recipient shall use the small purchase method (see § 29-70.102) involving relatively simple informal procedures that are sound and appropriate if a procurement costs, in the aggregate, not more than $10,000 or "small purchase" dollar limit of less than $10,000 when prescribed by State or local government. The recipient shall obtain price or rate quotations from an ade-

quate number of qualified sources to ensure reasonable competition.

(b) *Formal advertising (sealed bid) method.* (1) The recipient shall use the formal advertising (sealed bid) procurement method (see § 29-70.102) if, as a minimum, the following conditions are present:

(i) A complete, adequate, and realistic specification or purchase description is available;

(ii) Two or more responsible (see "responsible contractor" definition in § 29-70.102) suppliers are willing and able to compete effectively for the award; and

(iii) The procurement lends itself to a firm fixed-price contract, and contractor selection based principally on price is appropriate.

(2) In formally advertised procurements, the recipient shall:

(i) Solicit bids by issuing an "invitation for bids" to known suppliers and by publicly advertising the invitation, allowing sufficient time prior to the date of bid opening to permit adequate responses;

(ii) In the invitation for bids (including specifications and attachments), clearly define the items or services needed to enable bidders to respond properly;

(iii) Open all bids publicly at the time and place stated in the invitation for bids; and

(iv) Award a firm fixed-price contract (lump sum or unit price) by written notice to the responsible bidder whose bid, conforming to the invitation for bids, is lowest in price. The recipient shall consider factors such as discounts, transportation costs, and life cycle costs if the invitation for bids provides for their consideration. The recipient may use payment discounts to determine the low bid only if prior recipient experience indicates that such discounts are generally taken.

(3) The recipient may reject any or all bids when there are sound, documented business reasons in the best interest of the program.

(c) *Competitive negotiation method.* (1) The recipient shall use the competitive negotiation method (see § 29-70.102) if the following conditions are present:

(i) The nature of the item or service needed precludes developing a specification or a purchase description so precise that all interested parties have an identical understanding of the requirement;

(ii) In addition to price, other factors will be considered in making an award; and

(iii) Two or more responsible suppliers are willing and able to compete effectively for the award.

(2) When using the competitive negotiation method, the recipient shall:

(i) Solicit offers by distributing Requests for Proposals (RFPs) (see § 29-70.102) to an adequate number of qualified sources to ensure competition (generally sources included on recipient source lists), and by publicizing the RFP and honoring requests for copies of the RFP to the maximum extent practicable;

(ii) Ensure that the RFP identifies all significant evaluation factors, including cost or price, and the relative importance of each;

(iii) Provide mechanisms for making technical evaluations of proposals received and determinations of responsible offerors for the purpose of holding written or oral discussions; for conducting negotiations with offerors deemed to be in the competitive range (offerors whose proposals, when evaluated, are believed to have a reasonable chance of being selected for award); and for selecting the contractor; and

(iv) Award the contract to the responsible offeror whose proposal will be most advantageous to the recipient, price and other factors considered; and notify unsuccessful offerors of the award.

(3) The recipient may utilize competitive negotiation procedures for procurement of Architectural/Engineering professional services, whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation.

(d) *Noncompetitive negotiation method.* (1) The recipient may use the noncompetitive negotiation method (see § 29-70.102) under the following circumstances when use of the small purchase, competitive sealed bid

(formal advertising), or competitive negotiation method is not feasible:

(i) If a public exigency or emergency exists and the urgency of the requirement will not permit a delay incident to obtaining competition;

(ii) If the item is available from only a single source; or

(iii) If, after soliciting a number of sources, competition is deemed inadequate.

(2) Unless the recipient's procurement system has been certified in accordance with § 29-70.216-4, the recipient shall obtain prior grant officer approval for noncompetitive negotiated procurements expected to exceed $10,000 (see § 29-70.216-6(b)) which were not identified in the approved grant or agreement budget except for procurements made in cases of public exigency or emergency under § 29-70.216-9(d)(1)(i). In such cases (of public exigency or emergency), the recipient shall document the circumstances under which the procurement was made and shall notify the grant officer as soon thereafter as possible.

(e) *Other procurement methods.* The recipient may use other innovative procurement methods after obtaining prior approval of the grant officer. A DOL Agency approving such a method shall send a copy of the approval to the OFPP.

[45 FR 82832, Dec. 16, 1980]

§ 29-70.216-10 Contract pricing.

(a) The recipient shall make a price or cost analysis (as appropriate to the kind of contract) with every procurement action, including contract modifications. The recipient may perform a price analysis by making a comparison among price quotations submitted, or by comparing price quotations submitted with current market prices (considering discounts, if appropriate). The recipient shall perform a cost analysis by reviewing and evaluating each element of costs submitted to determine its reasonableness, allocability to work undertaken under the procurement, and allowability under applicable Federal cost principles.

(b) The DOL Agency shall allow costs or prices based on estimated costs for recipient contracts only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with terms of the grant or agreement and applicable Federal cost principles.

(c) The recipient shall not use a cost-plus-a-percentage-of-cost or percentage-of-construction-cost contract.

[45 FR 82833, Dec. 16, 1980]

§ 29-70.216-11 Recipient procurement records.

The recipient shall maintain files and other records sufficient to detail the significant history of a procurement. Files and other records for procurements using other than small purchase procedures shall include as a minimum: Rationale for procurement method used and any required justifications for the use of noncompetitive procurement; the basis for the selection of contract type; required grant officer approvals; the basis for contractor selection or rejection; and the basis for the award cost or price.

[45 FR 82833, Dec. 16, 1980]

§ 29-70.216-12 Recipient contract administration.

The recipient shall maintain a system for contract administration to ensure that contractors and other suppliers comply with terms, conditions, and performance requirements of contracts (including purchase orders), and to ensure adequate and timely completion of all transactions.

[45 FR 82833, Dec. 16, 1980]

§ 29-70.216-13 Content and provisions of recipient contracts.

(a) *General.* Except for small purchases (purchases of $10,000 or less—see § 29-70.216-9(a)), the recipient shall award a contract through a bilaterally executed written agreement which includes all provisions needed to define a sound and complete agreement. The recipient shall include in the written agreement the price or estimated cost, method of payment, scope and extent of work, period of performance, and other information pertinent to the particular procurement.

(b) *Required general provisions.* In addition, the recipient shall include, in

each contract exceeding $10,000, the following provisions, and shall require that its contractors include the provisions in their subcontracts exceeding $10,000:

(1) A provision which will allow for administrative, contractual, or legal remedies if the contractor violates or breaches terms of the contract; and which provides for appropriate sanctions and penalties.

(2) A provision for termination of the contract for default; and for termination because of circumstances beyond the control of the contractor. The provision shall include conditions under which termination actions will be taken, the manner of taking such actions, and the basis for settlement.

(3) Except for a formally advertised contract awarded on a fixed price basis, a provision that the contractor shall maintain adequate records related to work under the grant or agreement program; and shall make available to the recipient, the Secretary of Labor, the Comptroller General of the United States, or any duly authorized representative, any books, documents, papers, and records which are pertinent to that specific contract for the purpose of making audits, examinations, excerpts, and transcriptions. Contract records shall be retained for a period of 3 years after final payment is made to the contractor and all other pending matters are closed. "Pending matters" include, but are not limited to, an audit, litigation, or other action involving the records.

(4) A provision that the contractor will take the following actions to ensure that small, minority, and women's businesses shall have the maximum practicable opportunity to participate in the performance of the contract:

(i) Include small, minority, and women's businesses on source lists and assure that they are solicited whenever they are potential sources;

(ii) Divide total requirements into smaller requirements to permit maximum small, minority, and women's business participation whenever economically feasible; and

(iii) Use the services and assistance of the Small Business Administration, the Minority Business Development Agency of the Department of Commerce, and the Community Services Administration, as required.

(5) All other provisions of the grant or agreement which flow down and are applicable to a recipient contract.

(6) *Executive Order 11246—Equal Employment Opportunity.* In addition to the above, the recipient shall include the following equal employment opportunity clause (prescribed in 41 CFR 60-1.4) in all contracts and shall require that its contractors include the clause in their contracts which have, or are expected to have, an aggregate value within a 12-month period exceeding $10,000:

EQUAL OPPORTUNITY

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during their employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, as amended, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of the Executive Order 11246 of September 24, 1965, as amended, and of the rules, regulations, and relevant orders of the Secretary of Labor.

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(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, as amended, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, as amended, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, as amended, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(c) *Special provisions.* The recipient shall include any or all of the following provisions in contracts requiring their inclusion, as indicated in the following paragraphs:

(1) *Clean Air Act of 1970 (42 U.S.C. 1857 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.)* or amendments thereto.

The recipient shall include the following certification and provision in any solicitation and resulting contract in excess of $100,000:

(i) *Certification:*

CLEAN AIR AND WATER CERTIFICATION

The bidder or offeror certifies as follows:

(a) Any facility to be utilized in the performance of this proposed contract has □, has not □ been listed on the Environmental Protection Agency (EPA) List of Violating Facilities.

(b) It will promptly notify the recipient, prior to award, of the receipt of any communication from the Director, Office of Federal Activities, EPA, indicating that any facility which it proposes to use for the performance of the contract is under consideration to be listed on the EPA List of Violating Facilities.

(c) It will include substantially this certification, including this paragraph (c), in every nonexempt subcontract.

(ii) *Provision:*

CLEAN AIR AND WATER

(a) The contractor agrees as follows:

(1) To comply with all the requirements of section 114 of the Clean Air Act, as amended (42 U.S.C. 1857 et seq.), and section 308 of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) respectively, relating to inspection, monitoring, entry, reports, and information, as well as other requirements specified in section 114 and section 308 of the Air Act and the Water Act, respectively, and all regulations and guidelines issued thereunder before the award of this contract.

(2) That no portion of the work required by this contract will be performed in a facility listed on the EPA List of Violating Facilities on the date when this contract was awarded unless and until the EPA eliminates the name of such facility or facilities from such listing.

(3) To use its best efforts to comply with clean air standards and clean water standards at the facility in which the contract is being performed.

(4) To insert the substance of the provisions of this clause into any nonexempt subcontract, including this paragraph (a)(4).

(b) The terms used in this clause have the following meanings:

(1) The term "Air Act" means the Clean Air Act, as amended (42 U.S.C. 1857 et seq.).

(2) The term "Water Act" means Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq.).

(3) The term "clean air standards" means any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, or other requirements which are contained in, issued under, or otherwise adopted pursuant to the Air Act or Executive Order 11738, an applicable implementation plan as described in section 110(d) of the Clean Air Act (42 U.S.C. 1857c-5(d)), an approved implementation

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procedure or plan under section 111(c) or section 111(d), respectively, of the Air Act (42 U.S.C. 1857c-6 (c), or (d)), or an approved implementation procedure under section 112(d) of the Air Act (42 U.S.C. 1857c-7(d)).

(4) The term "clean water standards" means any enforceable limitation, control, condition, prohibition, standard, or other requirement which is promulgated pursuant to the Water Act or contained in a permit issued to a discharger by the EPA or by a State under an approved program, as authorized by section 402 of the Water Act (33 U.S.C. 1342), or by local government to ensure compliance with pretreatment regulations as required by section 307 of the Water Act (33 U.S.C. 1317).

(5) The term "compliance" means compliance with clean air or water standards. Compliance shall also mean compliance with a schedule or plan ordered or approved by a court of competent jurisdiction, the EPA or an air or water pollution control agency in accordance with the requirements of the Air Act or Water Act and regulations issued pursuant thereto.

(6) The term "facility" means any building, plant, installation, structure, mine, vessel or other floating craft, location, or site of operations, owned, leased, or supervised by a contractor or subcontractor, to be utilized in the performance of a contract or subcontract. Where a location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility except where the Director, Office of Federal Activities, EPA, determines that independent facilities are collocated in one geographical area.

(2) *Patents and copyrights.* If the contract involves research, development, experimental, or demonstration work, the contract shall include a provision setting forth DOL requirements and regulations pertaining to:

(i) Reporting and patent rights with respect to any discovery or invention which arises or is developed in the course of or under the contract; and

(ii) Copyrights and rights in data. The provision shall be consistent with the requirements of § 29-70.215-9 concerning intangible personal property.

(3) *Contract Work Hours and Safety Standards Act (40 U.S.C. 327-332).* (i) If the grant or agreement is under a statute providing wage standards for such work, the recipient shall include the provision described in paragraph (c)(3)(iii) in any nonconstruction contract which involves the employment of mechanics and laborers (including watchmen, guards, apprentices, and trainees) if the contract exceeds $2,500.

(ii) The requirements of the Act do not apply to contracts for transportation or transmission of intelligence, to contracts under which work is to be performed solely within a foreign country, to contracts for the purchase of supplies or materials or articles ordinarily available on the open market, or to work where the DOL assistance is in the form of a loan guarantee or insurance.

(iii) The provision covering overtime requirements for nonconstruction contracts (for construction contracts, see § 29-70.216-13(d)(4)) shall be substantially the same as the following provision as set forth in 29 CFR 5.5 (c) and (e):

CONTRACT WORK HOURS AND SAFETY STANDARDS ACT—OVERTIME COMPENSATION

(1) *Overtime requirements.* No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times his or her basic rate of pay for all hours worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek, as the case may be.

(2) *Violation; liability for unpaid wages; liquidated damages.* In the event of any violation of the clause set forth in subparagraph (1), the contractor and any subcontractor responsible therefor shall be liable to any affected employee for his or her unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such district or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the clause set forth in subparagraph (1), in the sum of $10 for each calendar day on which such employee was required or permitted to work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in subparagraph (1).

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(3) *Withholding for unpaid wages and liquidated damages.* The Department of Labor may withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in subparagraph (2).

(4) *Subcontracts.* The contractor shall insert in any subcontracts the clauses set forth in subparagraphs (1), (2), and (3) of this paragraph and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts which they may enter into, together with a clause requiring this insertion in any further subcontracts that may in turn be made.

(5) *Records.* The contractor shall maintain payroll records containing the information specified in 29 CFR 516.2(a). Such records shall be preserved for 3 years from the completion of the contract.

(d) *Provisions—construction contracts.* The recipient shall include the following provisions in construction contracts if applicable:

(1) *Bonding requirements.* In awarding contracts for construction or facility improvement, the recipient shall require that contractors observe the bonding requirements of § 29-70.202-2(a).

(2) *Prevailing wage requirements in accordance with the Davis-Bacon Act (40 U.S.C. 276a-276a-7).* When required by the Federal program legislation, the recipient shall include in contracts in excess of $2,000 for construction, alteration, and/or repair, including painting and decorating, of a building or work financed in whole or in part with Federal funds, a provision requiring compliance with the Davis-Bacon Act prevailing wage requirements, as implemented by DOL regulations (29 CFR, Parts 1 and 5). In addition, the recipient shall obtain from the DOL (through the nearest Wage-Hour area or regional office) and shall include in each solicitation and resulting contract, a copy of the current prevailing wage determination issued by the DOL. The recipient shall condition the award of such a contract upon the contractor's acceptance of the wage determination. (Contractors subject to the Act are required to pay not less often than once a week, minimum wages, including fringe benefits, to mechanics and laborers engaged in construction activity, based on the determinations by the Secretary of Labor of wage rates and fringe benefits prevailing for the corresponding classes of mechanics and laborers employed on similar projects in the same locality.) The recipient shall report all suspected or reported violations to the responsible DOL Agency; and shall include a provision, as set forth in 29 CFR 5.5(a), in all contracts or subcontracts subject to the Act:

(1) *Minimum wages.* (i) All mechanics and laborers employed or working upon the site of the work, or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project, will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3)), the full amounts due at time of payment computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics; and the wage determination decision shall be posted by the contractor at the site of the work in a prominent place where it can be easily seen by the workers. For the purpose of this clause, contributions made or costs reasonably anticipated under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of 29 CFR 5.5(a)(1)(iv). Also for the purpose of this clause, regular contributions made or costs incurred for more than a weekly period under plans, funds, or programs, but covering the particular weekly period, are deemed to be constructively made or incurred during such weekly period.

(ii) The recipient shall require that any class of laborers or mechanics, including apprentices and trainees, which is not listed in the wage determination and which is to be employed under the contract, shall be classified or reclassified conformably to the wage determination and a report of the action taken shall be sent by the recipient to the Secretary of Labor. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics, including apprentices and trainees to be used, the question accompanied by the recommenda-

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tion of the recipient shall be referred to the Secretary for final determination.

(iii) The recipient shall require, whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly wage rate and the contractor is obligated to pay a cash equivalent of such a fringe benefit, an hourly cash equivalent thereof to be established. In the event the interested parties cannot agree upon a cash equivalent of the fringe benefit, the question, accompanied by the recommendation of the recipient, shall be referred to the Secretary of Labor for determination.

(iv) If the contractor does not make payments to a trustee or other third person, it may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing benefits under a plan or program of a type expressly listed in the wage determination decision of the Secretary of Labor which is a part of this contract: *Provided, however,* The Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(2) *Withholding.* The Department of Labor may withhold or cause to be withheld from the contractor so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices and trainees, employed by the contractor or any subcontractor on the work the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice or trainee, employed or working on the site of the work or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project, all or part of the wages required by the contract, the Department of Labor may, after written notice to the contractor or the recipient, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) *Payrolls and basic records.* (i) Payrolls and basic records relating thereto will be maintained during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work, or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project. Such records will contain the name and address of each such employee, his or her correct classification, rates of pay (including rates of contributions or costs anticipated of the types described in section 1(b)(2) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and the records which show the costs anticipated or the actual costs incurred in providing such benefits.

(ii) The contractor will submit weekly a copy of all payrolls to the Department of Labor (DOL) if the DOL is a party to the contract, but if the DOL is not such a party, the contractor will submit the payrolls to the recipient for transmission to the DOL. The copy shall be accompanied by a statement signed by the employer or his or her agent indicating that the wage rates contained therein are not less than those determined by the Secretary of Labor and that the classifications set forth for each laborer or mechanic conform with the work to be performed. A submission of a "Weekly Statement of Compliance" which is required under this contract and the Copeland regulations of the Secretary of Labor (29 CFR, Part 3) and the filing with the initial payroll or any subsequent payroll of a copy of any findings by the Secretary of Labor under 29 CFR 5.5(a)(1)(iv) shall satisfy this requirement. The recipient shall be responsible for the submission of copies of payrolls of all recipient contractors and subcontractors. The contractor will make the records required under the labor standards clauses of the contract available for inspection by authorized representatives of the recipient and the DOL, and will permit such representatives to interview employees during working hours on the job. Contractors employing apprentices or trainees under approved programs shall include a notation on the first weekly certified payrolls submitted to the recipient that their employment is pursuant to an approved program and shall identify the program.

(4) *Apprentices and trainees.* (i) *Apprentices.* Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or

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her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the contractor as to its entire work force under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not a trainee as defined in subdivision (ii) of this subparagraph or is not registered or otherwise employed as stated above, shall be paid the wage rate determined by the Secretary of Labor for the classification of work actually performed. The contractor or subcontractor will be required to furnish to the recipient or a representative of the Wage-Hour Division of the U.S. Department of Labor written evidence of the registration of its program and apprentices as well as the appropriate ratios and wage rates (expressed in percentages of the journeyman hourly rates), for the area of construction prior to using any apprentices on the contract work. The wage rate paid apprentices shall be not less than the appropriate percentage of the journeyman's rate contained in the applicable wage determination.

(ii) *Trainees.* Except as provided in 29 CFR 5.15, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. The ratio of trainees to journeymen shall not be greater than permitted under the plan approved by the Bureau of Apprenticeship and Training. Every trainee must be paid at not less than the rate specified in the approved program for his or her level of progress. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Bureau of Apprenticeship and Training shall be paid not less than the wage rate determined by the Secretary of Labor for the classification of work actually performed. The contractor or subcontractor will be required to furnish the recipient or a representative of the Wage-Hour Division of the U.S. Department of Labor written evidence of the certification of its program, the registration of the trainees, and the ratios and wage rates prescribed in that program. In the event the Bureau of Apprenticeship and Training withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) *Equal employment opportunity.* The utilization of apprentices, trainees, and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.

(5) *Compliance with Copeland Regulations (29 CFR Part 3).* The contractor shall comply with the Copeland Regulations (29 CFR Part 3) of the Secretary of Labor which are herein incorporated by reference.

(6) *Subcontracts.* The contractor will insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (5) and (7) and such other clauses as the Department of Labor may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts which they may enter into, together with a clause requiring this insertion in any further subcontracts that may in turn be made.

(7) *Contract termination; debarment.* A breach of clauses (1) through (6) may be grounds for termination of the contract, and for debarment as provided in 29 CFR 5.6.

(3) *Copeland (Anti-Kickback) Act (40 U.S.C. 276c and 18 U.S.C. 874).* The recipient shall include in all contracts in excess of $2,000 for construction, completion, or repair of public buildings, public works, or buildings or works financed in whole or in part by Federal funds, a provision prescribed in 29 CFR 5.5(a)(5), as set forth in § 29-70.216-13(d)(2), requiring compliance with the Copeland Act. The contractor or subcontractor shall submit payrolls and a statement of compliance weekly to the recipient for transmittal to the DOL pursuant to 29 CFR 3.3 and 3.4. The Copeland Act prohibits illegal deductions or kickbacks of wages to which employees are otherwise entitled. The recipient shall report all suspected or reported violations to the DOL.

(4) *Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333).* If the grant or agreement is under a statute providing wage standards for such work, the recipient shall include a provision in all construction contracts in excess of $2,000 which involve the employment of mechanics or laborers, including watchmen, guards, apprentices, and trainees. The provision shall

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be substantially the same as the provision set forth in § 29-70.216-13(c)(3) except that, if the contract is subject to the Davis-Bacon Act, the following paragraph required by Section 107 of the Contract Work Hours and Safety Standards Act should be substituted for paragraph (5) of the provision in § 29-70.216-13(c)(3):

(5) The contractor shall not require a laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to health and safety.

(5) *Executive Order 11246—Equal Employment Opportunity.* The recipient shall include or require the inclusion of the clause required in § 29-70.216-13(b)(6) and the Standard Federal Equal Employment Opportunity Construction Contract Specifications (Executive Order 11246) required in 41 CFR 60-4.3(a) in all nonexempt contracts or subcontracts involving federally assisted construction. In addition, a recipient whose grant or agreement involves federally assisted construction agrees that:

It will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: *Provided*, That if the recipient so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

It will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

It will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, as amended, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive Order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive Order. In addition, the recipient agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the recipient under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such recipient; and refer the case to the Department of Justice for appropriate legal proceedings.

[45 FR 82833, Dec. 16, 1980; 46 FR 3891, Jan. 16, 1981]

§ 29-70.216a Procurement standards—special requirements, nonprofit organizations.

[45 FR 82837, Dec. 16, 1980]

§ 29-70.216a-1 Special requirements.

The standards of § 29-70.216 apply to a recipient that is nonprofit organization with the following exceptions:

(a) *Procurement system reviews.* Section 29-70.216-4, which sets forth a procedure for review and certification of a recipient's procurement system, does not apply. Nevertheless, a DOL Agency may require that a recipient or prospective recipient submit its procurement procedures for DOL review prior to or subsequent to the grant or agreement award.

(b) *DOL reviews—contractor selection protests.* Section 29-70.216-5(b), which provides for DOL Agency review of a complaint or protest regarding recipient contractor selection procedures, does not apply. The recipient is the responsible authority without recourse to the DOL Agency regarding the settlement and satisfaction of all contractual issues arising out of procurements in support of the grant or agreement.

(c) *Required prior grant officer approvals.* Section 29-70.216-6(a), which waives the requirement for prior grant officer approval of proposed recipient contracts when a recipient has a federally certified procurement system (see § 29-70.216-4), does not apply. The recipient shall comply with § 29-70.216-6(b), which sets forth procurements

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for which prior grant officer approval is required.

(d) *Selection procedures—competition requirements.* To ensure objective contractor performance and eliminate unfair competitive advantage, the recipient shall not allow a bidder or offeror who has developed specifications, the statement of work, the invitation for bids, or the request for proposals to compete for the resulting contract.

(e) *Methods of procurement.* A nonprofit organization whose procurement procedures do not provide for formal advertising (as described in § 29-70.216-9(b)) shall ensure that procedures used provide for maximum competition and for the award of a contract to the bidder or offeror whose bid or offer is responsive to the solicitation and most advantageous to the recipient, price and other factors considered. The recipient may reject any or all bids or offers when it is in the recipient's interest to do so, and when such rejections are in accordance with applicable State and local law, rules, and regulations.

(f) *Type of procuring instrument.* The recipient shall use the type of procuring instrument (e.g., purchase order, fixed-price contract, cost-reimbursement contract, incentive contract) which is appropriate to the particular procurement and is in the best interest of the grant or agreement program.

[45 FR 82837, Dec. 16, 1980]

§ 29-70.216b Procurement standards—CETA requirements.

[45 FR 82837, Dec. 16, 1980]

§ 29-70.216b-1 Special CETA standards.

The procurement standards and requirements of § 29-70.216 and § 29-70.216a apply to CETA recipient procurement with the following exceptions and modifications:

(a) *On-the-job (OJT) training contracts, subgrants, and subagreements.* The following special procedures apply in awarding and administering on-the-job training contracts, subgrants, or subagreements:

(1) *Competition.* The recipient may make awards for on-the-job training of program participants without obtaining competition if the contracts, subgrants, or subagreements provide that an employer-employee relationship will exist between the contractor or subrecipient and the program participant; and that the contractor or subrecipient will provide job training to enable the participant to perform effectively as a regular employee of the contractor's or subrecipient's (or another employer's) establishment. When such awards are made, the recipient shall maintain a record of the awards and, if requested, shall furnish the grant officer with the record which includes the contractor's or subrecipient's name, award amount, and services to be performed (CETA, sec. 121(o)).

(2) *Required provisions.* Program regulations at 20 CFR 676.25-2 and 676.38 implement the statutory requirement (CETA, sec. 121(o)) that provisions for contracts, subgrants, or subagreements for OJT and for Title VII programs be kept to a minimum, *Provided,* That the award document includes all provisions needed to define a sound and complete agreement and any provision required by applicable Federal law.

(b) *List of potential contractors and subrecipients.* A recipient which is a prime sponsor shall maintain a list of potential recipient contractors or potential subrecipients who have expressed (in writing) an interest in being considered for awards (see 20 CFR 676.23). The list will include names, addresses, and products or services offered. The recipient shall establish methods and criteria for using the list; and the list shall be considered to be public information (CETA, sec. 103(a)(3)(B)).

(c) *Preferential contractor and subrecipient selection procedures.* In addition to the provisions of § 29-70.216-8(c) regarding preferential procurement procedures, the following applies:

(1) *Community-based organizations of demonstrated effectiveness.* A CETA recipient shall, in awarding contracts, subgrants, or subagreements, give special consideration to community-based organizations of demonstrated effec-

tiveness in accordance with 20 CFR 676.23 (CETA, sec. 123(1)).

(2) *Minority, small, and women-owned businesses.* In addition to the procedural requirements set forth in § 29-70.216-8(b), that the recipient provide opportunities for small, minority, and women-owned businesses to participate in its procurement, 20 CFR 676.37(d) provides that recipients may, when appropriate, ensure participation through minority and small business set-asides (CETA, sec. 121(k)).

(d) *Ineligible applicants for awards.* Program regulations at 20 CFR 676.62(c) provide that no nongovernmental individual, institution, or organization is eligible to receive a recipient contract, subgrant, or subagreement, or to be otherwise engaged to evaluate a CETA program, if the individual, institution, or organization is associated with the program as a consultant, technical advisor, or in any similar capacity (CETA, sec. 121(h)(1)).

(e) *Labor standards provisions—construction contracts and subcontracts.* The provisions set forth in § 29-70.216-13(d)(2) covering the prevailing wage requirements of the Davis-Bacon and related Acts apply to CETA recipient contracts and subcontracts as stated in § 29-70.104(b) and in 20 CFR 676.26.

(f) *CETA regulations.* Detailed requirements for CETA recipient procurement are set forth in CETA program regulations at 20 CFR 676.37 and 20 CFR 676.38.

[45 FR 82837, Dec. 16, 1980; 46 FR 3892, Jan. 16, 1981]

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PART 34–1—GENERAL

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AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 45 FR 49032, July 22, 1980, unless otherwise noted.

§ 34–1.000 Scope of part.

This part sets forth introductory information concerning the ED Procurement Regulations, describes the methods by which the Department of Education implements and supplements the Federal Procurement Regulations (FPR), and contains policies and procedures which implement and supplement Part 1–1 of the FPR.

Subpart 34–1.1—Regulation System

§ 34–1.101 Scope of subpart.

This subpart sets forth introductory information pertaining to the ED Pro-

curement Regulations (herein referred to as EDPR), explains their purpose, authority under which they are issued, their relationship to the FPR System, applicability, method of issuance, exclusions, and arrangement. It also provides procedures for implementing and supplementing the FPR and the EDPR, and sets forth deviation procedures.

§ 34-1.102 Purpose.

The EDPR are issued to establish uniform policies and procedures which conform with the Federal Procurement Regulations System. The objectives of the Federal Procurement Regulations System are: To provide greater uniformity in Government procurement policies and procedures applicable to the procurement of personal property and nonpersonal services (including construction); to provide for codification and publication of policies and procedures; and to make the policies and procedures readily available to procurement officials, and to the public, as applicable.

§ 34-1.103 Authority.

The EDPR are prescribed by the Secretary under authority 5 U.S.C. 301 and Section 205(c) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)).

§ 34-1.104 Applicability.

The FPR and EDPR apply to all ED procurements of personal property, real property by lease, and nonpersonal services (including construction). The EDPR applies to contracts and to agreements and other instruments (regardless of name) which are subject to 41 U.S.C. 252. Unless specified otherwise, these regulations apply to procurements within and outside the United States. Requests for authority to deviate from the FPR and EDPR shall comply with procedures set forth in §§ 1-1.009 and 34-1.109.

§ 34-1.105 Exclusions.

Certain ED policies and procedures which come within the scope of this chapter nevertheless may be excluded from ED Procurement Regulations. The exclusions are categorized as follows:

(a) Policy or procedure which is expected to be effective for a period of less than 6 months which shall be issued in procurement circular format.

(b) When the time will not permit preparation in final codified form, the policy or procedure shall be issued in procurement circular format. Conversion to permanent type EDPR shall be made as soon as possible, in most instances, within 180 days.

(c) Issuances of a semipermanent nature which have limited applicability, such as those pertaining to a specific program or geographical area (e.g., metropolitan Washington, D.C.), shall be published as manual guides.

§ 34-1.106 Issuance.

(a) EDPR implement, supplement, and in some instances may deviate from, the FPR. Implementing material is that which expands upon or indicates the manner of compliance with related FPR material. Supplementing material is that for which there is no counterpart in the FPR. Deviating material is defined in § 1-1.009 of the FPR.

(b) Material published in the FPR which has Government-wide applicability becomes effective throughout ED upon the effective date cited in the particular FPR material. Such material generally will not be repeated, paraphrased, or otherwise stated in EDPR except to the extent necessary to implement or deviate from the FPR. EDPR material will be effective on the date of the transmittal notice by which distributed unless otherwise indicated in the respective transmittal notice.

(c) All EDPR material deemed necessary for the general public to understand basic and significant ED procurement policies and procedures will be published in the FEDERAL REGISTER and codified as Chapter 34 of Title 41, Code of Federal Regulations. The FEDERAL REGISTER and Title 41 of the Code of Federal Regulations may be purchased from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

§ 34-1.107 Arrangement.

§ 34-1.107-1 General plan.

(a) The EDPR conform with the Federal Procurement Regulations System with respect to divisional arrangements into parts, subparts, sections, subsections, and further subdivisions as necessary.

(b) As the FPR System pertains to the Department, it consists of (1) regulations published by the Administrator of General Services in Chapter 1—Federal Procurement Regulations, and (2) complementary Departmental regulations published in Chapter 34.

§ 34-1.107-2 Numbering.

(a) The FPR System of numbering permits the keying of similar subject matter throughout Chapters 1 and 34. Each section number is a combination showing to the left of the decimal point the chapter and part numbers, separated by a dash. To the right of the decimal point the subpart, section, and subsection numbers are indicated in that order. Thus, the Department, to complement the cost-plus-a-fixed-fee contract provisions contained in Chapter 1, Part 1-3, Subpart 1-3.4, Section 04, Subsection 3 of the Federal Procurement Regulations (§ 1-3.404-3), would assign the section number "34-3.404-3" to the complementary provisions.

(b) Where material in the FPR requires no implementation or deviation, there is no corresponding number in the EDPR. Thus, there are gaps in the EDPR sequence of numbers where the FPR, as written, are applicable to ED procurement.

§ 34-1.107-3 Citation.

The EDPR will be cited in the same manner as the FPR are cited. Thus, this section, in referring to divisions of the FPR system, should be cited as "§ 34-1.107-3 of Chapter 34." When the official Code of Federal Regulations citation is used, this section should be cited as "41 CFR 34-1.107-3." Any section of the EDPR may be identified informally, for purposes of brevity, as "EDPR" followed by the section number, such as "EDPR 34-1.107-3."

§ 34-1.109 Deviation.

§ 34-1.109-1 Description.

As used in the EDPR, the term "deviation" pertains to actions set forth in § 1-1.009-1 of this title.

Subpart 34-1.3—General Policies

§ 34-1.318 Contracting officer's decision under a disputes clause.

A copy of each contracting officer's decision shall be furnished to the contractor by certified mail, return receipt requested, or in person, obtaining a receipt therefor.

§ 34-1.318-50 Decision preparation, processing, and modification or withdrawal.

(a) Where a dispute arises under a contract, the contracting officer will prepare a final decision pursuant to the Disputes Clause of the contract. This single document in the format set forth in paragraph (b) of this section should contain a simple and concise statement of: (1) The claim, (2) the decision, (3) the findings of fact which support the decision, and (4) the reference to the Disputes Clause.

(b) The following format is suggested for use by contracting officers in preparing decisions under the disputes clause, if the contractor's claim is disallowed:

_____

(Date of findings and decision)

Subject: Decision disallowing request of

_____

(Name of contractor)

Under contract No. _____

Date _____

To: _____

(Name and address of contractor)

1. In accordance with the provisions of the above-numbered contract, I have considered your request for (insert factual description of the request to identify clearly its nature and scope).

2. Your request as set forth above is disallowed (in whole or in part, according to the fact) for the following reasons: (Insert the findings of fact upon which the disallowance or allowance is based.)

3. The disputes "Clause" of the contract provides that within 90 days from the date of receipt hereof the contractor may appeal from this decision by mailing or otherwise

furnishing to the contracting officer a written appeal addressed to the Secretary of the Department of Education. Two copies should accompany the original notice of appeal. The notice of appeal should identify the contract (by number), the decision from which the appeal is taken, and be signed by appellant or an officer of appellant organization, or by a duly authorized representative or attorney.

4. The General Services Administration Board of Contract Appeals (GSBCA) is the authorized representative of the Secretary for hearing and determining such disputes.

(c) Contracting officers shall refer all proposed final decisions to the Office of General Counsel for advice as to legal sufficiency and format before forwarding them to contractors. Contracting officers shall submit a copy of the complete contract file with each proposed final decision.

(d) At any time within the period of appeal, the contracting officer may modify or withdraw the contracting officer's final decision. If an appeal from the final decision has been taken to the GSBCA, the contracting officer will forward the contracting officer's recommended action to the Office of General Counsel together with the file required by § 34-1.318-50(c), as supplemented to support the recommended correction or amendment.

§ 34-1.318-51 Disputes appeals.

The Secretary has designated the GSBCA to hear, consider, and determine fully and finally appeals by contractors from decisions of contracting officers or their authorized representatives pursuant to the provisions of contracts requiring his decisions.

§ 34-1.318-52 Preparation and processing of appeal files.

(a) *Forwarding appeals.* When a notice of appeal in any form has been received by the contracting officer, the contracting officer shall endorse thereon the date of mailing (or date of receipt, if otherwise conveyed) and within 10 days shall forward said notice of appeal to the GSBCA with a copy to the Office of General Counsel. Following receipt by the Board of the original notice of an appeal (whether through contracting officer or otherwise), the contractor, the contracting officer, and the Office of General Counsel, will be promptly advised of its receipt, and the contractor will be furnished a copy of the rules of the GSBCA.

(b) *Duties of the contracting officer.* Within 30 days of receipt of an appeal, or advice that an appeal has been filed, the contracting officer shall assemble and transmit to the Board, with a copy to the ED Government trial attorney, an appeal file consisting of all documents pertinent to the appeal, including:

(1) The decision and findings of fact from which the appeal is taken.

(2) The contract, including specifications and pertinent amendments, plans and drawings.

(3) All correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which the decision was issued.

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board.

(5) Any additional information considered pertinent.

Within 30 days of receipt of an appeal or advice that an appeal has been filed, the contracting officer shall furnish the appellant with a copy of each document transmitted to the Board, except those enumerated in paragraph (b)(2) of this section, for which a list of the contractual documents submitted will suffice. Documents in the appeal file may be originals or legible facsimiles or authenticated copies thereof, and shall be arranged in chronological order, where practicable, numbered sequentially, tabbed and indexed to identify the contents of the file. A copy of any material submitted to the GSBCA should be submitted to the Office of General Counsel.

(c) *Formats.* The following format is suggested for transmitting appeal files to the GSBCA:

Your reference: ——————————
(Docket No.)

Ms. Ruth Marino,
Clerk, General Services Administration Board of Contract Appeals, 18th and F Streets, N.W., Washington, D.C. 20405.

DEAR MS. MARINO: Transmitted herewith are documents relative to appeal under contract No.——————————with the

———————————————

(name of contractor.)

The request for payment of charges resulting from the processing of this appeal should be addressed to:

———————————————

———————————————

(Insert name and address of cognizant finance office.)

(d) The Office of General Counsel is designated as the Government Trial Attorney to represent the Government in the defense of appeals before the GSBCA. Decisions of the GSBCA will be transmitted by the Government Trial Attorney to appropriate contracting officers for action according to GSBCA's decision.

(e) At all times after the filing of an appeal, the contracting officer will render all assistance requested by the Office of General Counsel. Whenever an appeal is set for hearing, the contracting officer concerned, acting under the guidance of the Office of General Counsel, will be responsible for arranging for the presence of Government witnesses and specified physical and documentary evidence at both the pre-hearing conference and the hearing.

(f) Whenever the contractor, subsequent to filing an appeal with the GSBCA, elects nevertheless to accept fully the decision from which appeal was taken or any modification thereof, and gives written notification of such acceptance to the Office of General Counsel or the contracting officer concerned, the Office of General Counsel will notify the GSBCA of the disposition of the dispute.

§ 34-1.350 Procurement involving bulk mailing.

(a) *Use of official mailing indicia.* Envelopes or labels may be furnished to contractors for use in accordance with contract terms. However, they must bear the printed return address of the Department over the words "Official Business." The name and return address of a private person or firm must never be used on an envelope or label bearing official mailing indicia. This includes envelopes mailed by the contractor as well as envelopes used in reply to a contractor's inquiries.

(b) *Use of Zip Code presort.* All contracts and all solicitation documents for proposed procurements to be entered into with private mailers, or other contracts when bulk mailing is incident to contract performance, shall include the stipulation that mailings will be prepared in compliance with current Zip Code Presort requirements, and be deposited in the post office no later than 4:00 p.m.

§ 34-1.353 Treatment of technical data in contract proposals.

(a) *General.* Technical data (such as plans, designs, suggestions, improvements or concepts) acquired by ED may have been obtained under conditions which restrict ED's right to use the data. Therefore, care must be taken when considering the use of technical data to assure that ED has sufficient rights to use the data in the manner desired. One of the principal ways in which ED receives technical data is by means of proposals. ED has a continuing interest in receiving and evaluating proposals which are pertinent to its potential needs in carrying out its objectives and goals. Some proposals are offered and received under conditions which may prevent ED from using the technical data contained therein other than for evaluation purposes. Proposals received by ED are of two types—solicited and unsolicited. The policies and procedures for handling unsolicited proposals are set forth in Subpart 34-4.52.

(b) *Definitions*—(1) *Unsolicited proposal.* Essentially, an unsolicited proposal is a written offer to perform work which does not result from a formal written request for proposals or quotations. See Subpart 34-4.5201 for a definitive definition.

(2) *Solicited proposal.* A solicited proposal is a written offer to perform work which results from a formal writ-

ten request for proposals or quotations.

(c) *Policy for unsolicited proposals.* It is the policy of ED to use technical data included in unsolicited proposals for evaluation purposes only. However, due to the administrative problems involved in handling the large number of unsolicited proposals received, the Government cannot assume liability for disclosure or use of such technical data unless it is marked by the offeror in accordance with the legend set forth below. The Government assumes no liability for disclosure or use of unmarked technical data and may use or disclose the data for any purpose and may consider that the proposal was not submitted in confidence and therefore releasable under the Freedom of Information Act (5 U.S.C. 552). Each proposal containing technical data, which the offeror intends to be used by ED for evaluation purposes only, should be marked on the cover sheet with the following legend and shall specify the pages of the proposal to be restricted in accordance with the conditions of the legend:

Technical data contained in pages ——— of this proposal shall not be used or disclosed, except for evaluation purposes: *Provided*, That if a contract is awarded to this offeror as a result of or in connection with the submission of this proposal, the Government shall have the right to use or disclose this technical data to the extent provided in the contract. This restriction does not limit the Government's right to use or disclose technical data obtained from another source without restriction.

Contracting officers and other Government personnel shall not refuse to consider any proposal merely because the proposal is restrictively marked. Proposals, or portions thereof, so marked shall be used only for evaluation and shall not otherwise be used or disclosed without the written permission of the offeror except under the conditions provided in the legend. In the event an unsolicited proposal is submitted with more restrictive conditions than those provided in the legend above, ED may be unable to consider it, in which case the offeror should be so advised, see § 34-1.353(f)(2).

(d) *Policy for solicited proposals.* (1) ED recognizes that requests for proposals may require the offeror, including his subcontractor(s), if any, to submit technical data which the offeror or the offeror's subcontractor(s) does not want used or disclosed for any purpose other than for evaluation of the proposal. Each proposal containing technical data which the offeror or the offeror's proposed subcontractor(s) desires to restrict shall be marked on the cover sheet by the offeror with the legend set forth in paragraph (d)(2) of this section. Proposals, or portions thereof, so marked shall be used only for evaluation and shall not otherwise be used or disclosed without the written permission of the offeror except under the conditions provided in the legend. The Government assumes no liability for disclosure or use of unmarked technical data in solicited proposals and may use or disclose the data for any purpose and may consider that the proposal was not submitted in confidence and therefore releasable under the Freedom of Information Act (5 U.S.C. 552).

(2) The following provision shall be inserted in the RFP:

The proposal submitted in response to this request may contain technical data which the offeror or his subcontractor(s) does not want used or disclosed for any purpose other than for evaluation of the proposal. The use and disclosure of any such technical data may be so restricted: *Provided*, The offeror marks the cover sheet of the proposal with the following legend, specifying the pages of the proposal which are to be restricted in accordance with the conditions of the legend:

Technical data contained in pages ——— of this proposal shall not be used or disclosed, except for evaluation purposes: *Provided*, That if a contract is awarded to this offeror as a result of or in connection with the submission of this proposal, the Government shall have the right to use or disclose this technical data to the extent provided in the contract. This restriction does not limit the Government's right to use or disclose technical data obtained from another source without restriction.

The Government assumes no liability for disclosure or use of unmarked technical data and may use or disclose the data for any purpose and may consider that the proposal was not submitted in confidence and therefore releasable under the Freedom of Information Act (5 U.S.C. 552).

Proposals submitted with restrictive legends or statements differing from the above legend will be treated under the terms of the above legend.

(e) *ED notice for handling proposals.* In order that both solicited and unsolicited proposals are handled in accordance with the policies set forth in paragraphs (c) and (d) of this section, the following notice shall be affixed to each solicited and unsolicited proposal which is to be disclosed outside the Government for evaluation purposes in accordance with the policies and procedures set forth in paragraph (f) of this section. Application of the following notice in no way alters any obligation of the Government or diminishes any rights to use or disclose technical data or business information.

ED NOTICE FOR HANDLING PROPOSALS

This proposal shall be used or duplicated only for evaluation purposes and this notice shall be applied to any reproduction or abstract thereof.

Disclosure of this proposal outside the Government for evaluation purposes shall not be made unless the policy and procedures prescribed by ED Procurement Regulation § 34-1.353(f)(2), including the requirements for approval and for an arrangement with the outside evaluator prior to disclosure, are followed.

The restrictions contained in this notice do not apply to technical data or business information obtained from another source without restriction.

(f) *Disclosure of solicited and unsolicited proposals outside the Government*—(1) *Policy.* It is the policy of ED to have proposals evaluated by the most competent technical and management sources available in the Government. However, in processing a proposal for evaluation, ED may find in some instances that it is necessary to disclose a proposal outside the Government to meet its evaluation needs. Such outside evaluation may be made provided the requirements in paragraphs (f) (2) and (3) of this section are met.

(2) *Approval.* Decisions to disclose proposals outside the Government for evaluation purposes shall be made by the chief official of the requiring organization having programmatic responsibility for the procurement, after consultation with the contracting officer for the procuring activity, and in accordance with agency procedures. The decision to disclose either a solicited or unsolicited proposal outside the Government for the purpose of obtaining an evaluation shall take into consideration avoidance of organizational conflicts of interest and the competitive relationship between the originator of the proposal and the prospective evaluator.

(3) *Evaluation of unsolicited proposals.* Should an unsolicited proposal under consideration contain a restrictive use statement or legend other than the legend prescribed in paragraph (c) of this section, the legend or statement should be reviewed to assure that it does not preclude ED from disclosing the proposal outside the Government for purposes of obtaining an evaluation. In the event ED is so precluded and an outside evaluation is nevertheless desired, the offeror should be advised that ED may be unable to consider the proposal unless the offeror consents in writing to having the proposal evaluated outside the Government.

(4) *Conditions of outside evaluation.* Where it is determined to disclose a proposal outside the Government pursuant to paragraph (f)(2) of this section, the following conditions, or similar appropriate conditions for the treatment of the proposal, shall be included in the agreement with the evaluator prior to such disclosure. Also, review should be made to assure that the notice required by paragraph (e) of this section is affixed to the proposal before it is disclosed to the evaluator.

CONDITIONS FOR EVALUATING PROPOSALS

The evaluator agrees to use the technical data and business information contained in the proposal only for evaluation purposes.

This requirement does not apply to technical data or business information obtained from another source without restriction.

Any notice or legend placed on the proposal by either ED or the originator of the proposal shall be applied to any reproduction or abstract thereof. Upon completion of the evaluation, the evaluator shall return all copies of the proposal and abstracts, if any, to the ED office which initially furnished the proposal for evaluation.

Unless authorized by the ED initiating office, the evaluator shall not contact the originator of the proposal concerning any aspects of its contents.

The evaluator will be obligated to obtain commitments from its employees in order to affect the purposes of these conditions.

(g) *Evaluation and testing of equipment and material.* Should evaluation of a proposal include the evaluation and testing of equipment or material submitted with the proposal, neither the Government nor any person acting on behalf of the Government assumes any liability to the submitter of the proposal, or any person acting on his behalf, in connection with any damage, loss, injury, or destruction resulting from such evaluation, and testing.

§ 34-1.354 Contracts conditioned upon availability of funds.

(a) *General.* In those situations where it is necessary to initiate a procurement properly chargeable to funds of the new fiscal year prior to the availability of such funds, contracts may be entered into conditioned upon the availability of funds. In these cases, the supplies or services shall not be accepted until the funds are available to the contracting officer for the procurement and until the contracting officer has given notice, confirmed in writing, to the contractor of the availability of funds. Appropriate records shall be maintained to insure adequate control of funds.

(b) *Limitations.* Contracts conditioned upon the availability of funds shall be used only for operation, maintenance and continuing services (e.g., janitorial services, garbage removal, utilities, rentals) which are necessary for normal operation and for which the Congress consistently appropriates funds.

§ 34-1.355 Federal Reports Act of 1942.

(a) *General.* The Federal Reports Act of 1942 (44 U.S.C. 3501 et seq.), prohibits the conducting or sponsoring of the collection of information, upon identical items, from 10 or more persons (other than Federal employees considered as such), unless the approval of the Director, Office of Management and Budget, is obtained in advance of the adoption or revision of any plans or forms for such collection.

(b) *Approvals.* Whenever possible, data requirements shall be defined, cleared within ED, and approval obtained from OMB prior to the issuance of the solicitation. The advice of the cognizant reports clearance officer shall be sought on all questions pertaining to required clearances.

Subpart 34-1.4—Procurement Responsibility and Authority

§ 34-1.403 Requirements to be met before entering into contracts.

(a) No contract shall be entered into, modified, or terminated unless all required reviews, clearances, or approvals have been obtained and all applicable requirements of law, the FPR, the EDPR, and other applicable regulations have been met.

(b) In addition to the requirements specified in paragraph (a) of this section, no negotiated contract shall be entered into until the determinations and findings required by Parts 1-3 and 34-3 of this title with respect to the circumstances justifying negotiation and use of any special method of contracting have been made. Negotiations, in any form, will not begin with prospective contractors until all required determinations and findings authorizing such negotiations have been made.

§ 34-1.405 Ratification of unauthorized contract awards.

(a) The Government is not bound by agreements or contractual commitments made to prospective contractors by persons to whom procurement authority has not been delegated. Such unauthorized acts may be in violation of the Federal Property and Administrative Services Act, other Federal laws, the FPR, the EDPR, and good procurement practice; e.g., certain requirements of law and regulation necessary for the proper establishment of a contractual obligation may not be met; i.e., certification of the availability of funds, determinations and findings, competition of sources, determination of contractor responsibility, certification of current pricing data,

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price/cost analysis, administrative approvals, negotiations of appropriate contract clauses, etc.

(b) Contracting officers shall not ratify contractual commitments made by other personnel of ED without the prior approval of the Assistant Secretary for Management or such other person as the Secretary may designate.

§ 34-1.405-50 Ratification procedure.

Requests received by contracting officers for ratification of commitments made by personnel lacking contracting authority shall be processed as follows:

(a) The individual who made the unauthorized contractual commitment shall furnish the contracting officer all records and documents concerning the commitment and a complete, written statement of facts, including, but not limited to, a statement as to why the procurement office was not utilized, why the proposed contractor was selected and a list of other sources considered, description of work to be performed or products to be furnished, estimated or agreed contract price, citation of appropriation available, and a statement of whether the contractor has commenced performance.

(b) The contracting officer will review the file and forward it to the Assistant Secretary for Management or such other person as the Secretary may designate with any comments or information which should be considered in evaluation of the request for ratification.

§ 34-1.451 [Reserved]

§ 34-1.452 Responsibility of other Government personnel.

§ 34-1.452-1 General.

(a) Responsibility for the decision of what to buy and when to buy rests with program and certain staff offices in the Office of the Secretary. Responsibility for determining how to buy, the conduct of the buying process, and execution of the contract rests with the procurement activity, the contracting officer in particular.

(b) Personnel responsible for making decisions to buy should maintain a close and continuous relationship with their procurement activity to ensure that personnel are made aware of contemplated procurement actions. This will be mutually beneficial in terms of better planning for procurement action and more timely, efficient, and economical procurement.

(c) Personnel not delegated contracting authority may not commit the Government, formally or informally to any type of contractual obligation (see § 34-1.405). However, program personnel who must use the contracting process to accomplish their programs, must support the contracting officer in ensuring that: (1) Requirements are clearly defined and specified; (2) competitive sources are solicited, evaluated, and selected; (3) quality standards are prescribed and met; (4) performance or delivery is timely; (5) prices, estimated costs, and fees are reasonable; (6) contract provisions, procurement regulations, and applicable laws are complied with; and (7) files are documented to substantiate the judgments, decisions, and actions taken. (See § 1-3.801-3.)

§ 34-1.452-2 Planning for procurement.

(a) Program and project plans should include a plan for procurement as an integral part of program or project development.

(b) Program and project managers should solicit the advice and assistance of procurement personnel in developing the procurement element of program and project plans so that the following factors can be considered early in the planning process:

(1) Definition of requirements in terms of specifications or work statement for use in invitations for bids, requests for proposals, and contract provisions.

(2) Development of "in-house" estimates for the cost of property or services to be procured, and identification of appropriated funds available for the contract.

(3) Identifications of factors which require special consideration, i.e., subcontracting; contractor financing; source evaluation criteria; providing facilities and equipment; quality control; product qualification testing and

acceptance; patents and copyright reporting requirements; and other approvals or clearances, etc.

(4) Development of lead-time necessary to complete the procurement process, i.e., prepare and process the purchase request, prepare and process the determination and findings, locate and evaluate sources, receive and evaluate bids or proposals, conduct preaward surveys or conferences, and negotiate and/or award the contract or contracts.

(c) It is incumbent upon initiators of procurement requirements to obtain timely approvals from higher authority whenever such approvals are required by regulations of this Department or other Government agencies; e.g., procurement of data processing resources; procurement of management consultant services; clearances by Office of Management and Budget; Government Printing Office, Treasury Department, General Services Administration, etc.

§ 34-1.452-3 Precontract support.

After submission of the requirement to the procurement activity, program personnel must continue to support the procurement process by providing advice and assistance to the contracting officer in activities such as:

(a) Formulation of procurement plans.

(b) Conduct preaward or preproposal briefing of prospective contractors.

(c) Conduct of preaward surveys to determine contractor responsibility in accordance with § 1-1.310 of this title.

(d) Evaluation of technical and business proposals submitted by contractors, including requests for Government-furnished facilities and equipment.

(e) Development or evaluation of plans, procedures, and contract provisions relating to quality control, inspection, test, and acceptance of products or services.

(f) Establishment of contract requirements concerning packing, packaging, marking, and shipment of products.

§ 34-1.452-4 Postaward contract administration.

(a) Upon execution of the contract by the contracting officer and the contractor, the mutual obligations of the Government and the contractor are established by and limited to the written stipulations in the contract instrument. Unless authorized by the contracting officer, ED personnel shall not direct or request the contractor to assume any obligation or take any action not specifically stated in the contract. Only the contracting officer may impose on the contractor any requirement which will result in a change to the contract. All contract changes must be directed in writing or confirmed in writing by the contracting officer.

(b) The role of program, technical, and other personnel in postaward administration of the contract is to assist or advise the contracting officer (or act as representatives when so designated by the contracting officer) in activities such as:

(1) Conduct of conferences to ensure mutual understanding between the Government and the contractor as to scope of the contract, technical and business requirements, and the rights and obligations of the parties.

(2) Technical direction during contract performance and matters relating to product delivery, acceptance, or rejection.

(3) Evaluation of contractor performance, including inspection and testing of products, evaluation of reports and data, subcontract management, utilization of facilities and equipment, cost control, etc.

(4) Contractor systems and procedures evaluation; including accounting policies and procedures, purchasing policy and practices, property accounting and control, wage and salary plans and rate structures, personnel policies and practices, etc.

(5) Modification, renewal, or termination of the contract.

(6) Processing of disputes under the disputes clause and appeals therefrom.

Subpart 34-1.6—Debarred, Suspended, and Ineligible Bidders

§ 34-1.600 Scope of subpart.

This subpart prescribes the policy and procedures of the Department of Education (ED) for (a) the establishment, use, maintenance, and distribution of a debarred, suspended, and ineligible bidders list, (b) the debarment and suspension of bidders for cause and (c) the placement of bidders in ineligible status for violations of the provisions of the Equal Opportunity clause.

§ 34-1.602 Establishment, maintenance and distribution of a list of concerns or individuals debarred, suspended, or declared ineligible (Debarred Bidders List).

(a) ED establishes and maintains a master consolidated list or file of firms and individuals who are administratively or legally debarred from ED contracting and subcontracting and from whom bids and proposals will not be solicited as provided in FPR 1-1.603. This list will be known as the ED Debarred Bidders List.

(b) Collectively, the following documents shall constitute the ED Debarred Bidders List:

(1) Consolidated List of Current Administrative Debarments by Executive Agencies, and amendments thereto, compiled and published by the Office of Investigation—OA, General Services Administration (GSA). This publication is a combined list of debarred, suspended, and ineligible bidders, compiled from notifications furnished to GSA by executive agencies of the Federal Government.

(2) Consolidated List of Persons or Firms Currently Debarred for Violations of Various Public Contracts Acts Incorporating Labor Standards Provisions, and amendments thereto, compiled by the Comptroller General of the United States.

(3) Consolidated List of Concerns and Individuals Debarred, Suspended, or Declared Ineligible by the Department of Education to participate in its procurement program under one or more of the bases set forth in FPR 1-1.602-1 and in accordance with the regulations in this subpart.

(4) Contract, Ineligible List of persons and firms declared ineligible by the Office of Federal Contract Compliance (OFCC) of the Department of Labor to participate in Government contracting or subcontracting by reason of noncompliance with the Equal Opportunity clause.

§ 34-1.602-1 Bases for entry on the ED debarred, suspended, and ineligible list.

The Assistant Secretary for Management or such other person as the Secretary may designate makes the administrative debarment determinations prescribed in FPR 1-1.602-1(d), (f), and (g).

(a)-(d) [Reserved]

(e) The Department Contract Compliance Officer directs that action prescribed by FPR 1-1.602-1(e) be taken.

§ 34-1.603 Treatment to be accorded firms or individuals in debarred, suspended, or ineligible status.

Total restrictions. The Assistant Secretary for Management or such person as the Secretary may designate makes the essential determinations required by FPR 1-1.603(a) and (e).

§ 34-1.604 Causes and conditions applicable to determination of debarment.

Determination to debar or take other action concerning a firm or individual for a cause or condition for a specified period of time as provided in § 1-1.604 of this title shall be made by the Assistant Secretary for Management or such other person as the Secretary may designate. Whenever cause for debarment becomes known to any contracting officer, he may submit recommendations for debarment to the Assistant Secretary for Management or such other person as the Secretary may designate through administrative channels. Such recommendations shall be accompanied by the documented file of the case.

§ 34-1.604-1 Procedural requirements relating to the imposition of debarment.

(a) *Initiation of debarment action.* The Assistant Secretary for Management or such other person as the Sec-

retary may designate, after consultation with the Office of General Counsel, shall determine whether the facts are sufficient to warrant debarment. If the decision is not to debar, the Assistant Secretary for Management or such other person as the Secretary may designate will notify the contracting officer recommending the action. If the Assistant Secretary for Management or such other person as the Secretary may designate decides to institute debarment proceedings, a letter will be sent by certified mail (return receipt requested) to the firm or individual proposed for debarment. The letter shall (1) state that debarment is being considered, (2) set forth the reasons for the proposed debarment, and (3) state that such party will be accorded an opportunity for a hearing within 30 days from the date of receipt of such letter.

(b) *Hearings.* Hearings requested in connection with debarment proceedings shall be conducted before the Assistant Secretary for Management or such other person as the Secretary may designate. An opportunity shall be afforded to the firm or individual to appear with witnesses and counsel to present facts or circumstances showing cause why such firm or individual should not be debarred. If the firm or individual elects not to appear, the reviewing authority will make its decision based on the facts on record and such additional evidence as may be furnished by the parties involved. After consideration of the facts, the reviewing authority shall notify the firm or individual of the final decision.

§ 34-1.605 Suspension of bidders.

§ 34-1.605-1 Causes and conditions under which ED may suspend contractors.

Any contracting officer may recommend suspension of bidders for the causes and conditions set forth in FPR 1-1.605-1. These recommendations shall be accompanied by the documented file of the case and be submitted through administrative channels to the Assistant Secretary for Management or such other person as the Secretary may designate for a determination of suspension.

§ 34-1.605-4 Notice of suspension.

The Assistant Secretary for Management or such other person as the Secretary may designate is responsible for notifying bidders of suspensions in accordance with the provisions of FPR 1-1.605-4.

§ 34-1.606 Departmental procedure.

The Assistant Secretary for Management or such other person as the Secretary may designate is responsible for complying with the provisions of FPR 1-1.606.

Subpart 34-1.10—Publicizing Procurement Actions

§ 34-1.1000 Scope of subpart.

This subpart establishes Departmental policy with respect to making solicitations available to interested parties and synopsizing proposed procurements in the Commerce Business Daily.

§ 34-1.1001 General policy.

It is the Department's policy to conduct its procurements in an open fashion, to make procurements known to the public in a timely manner, to foster open and unrestricted competition, and to allow potential bidders and offerors to participate in the procurement process without artificial restrictions.

§ 34-1.1002 Availability of invitations for bids, requests for proposals, and requests for quotations.

(a) Potential offerors/bidders must be allowed a reasonable period of time in which to prepare and submit a response to a solicitation. As a general rule, the response period is to be at least 20 calendar days when procuring standard commercial articles or services, and at least 30 calendar days when procuring other than standard commercial articles or services. The 20 and 30 calendar day response periods begin on the date the solicitation is issued. The response periods are applicable to all formally advertised and negotiated procurements and for small purchases of $5,000 and above, except in cases of unusual emergency.

(b) As indicated in § 1-1.1002 of this title, a reasonable number of copies of each solicitation publicized in the Department of Commerce Synopsis, including specifications and other pertinent information, are to be made available by the issuing office for distribution to requesting parties.

(1) A reasonable number of copies is defined as that number of copies necessary to promptly satisfy all requests received for the first 20 calendar days beginning on the date the solicitation is issued. All requests received during the 20-day periods are to be filled. Requests received after the 20-day periods may be filled on a supply available, first-come, first-served basis. If the supply of solicitations is exhausted after the twentieth day, an interested party requesting a copy should be so notified and advised that a copy of the solicitation is available in the issuing office for viewing.

(2) When response periods of less than 20 days for standard commercial articles or services and less than 30 days for other than standard articles or services are used, all requests received during these shorter than preferred periods are to be promptly filled. If a requestor requires a copy of a solicitation after these periods and the supply is exhausted, the requestor should be so notified.

§ 34-1.1003 Synopses of proposed procurements.

§ 34-1.1003-1 [Reserved]

§ 34-1.1003-2 General requirements.

(a)(1)-(7) [Reserved]

(8) The exemption from the requirement to synopsize in § 1-1.1003-2(a)(8) is applicable only when there is to be a noncompetitive procurement for services from one educational institution. When more than one educational institution is to be solicited, the procurement is required to be synopsized in the Commerce Business Daily.

(b) [Reserved]

Subpart 34-1.12—Responsible Prospective Contractors

§ 34-1.1200 Scope of subpart.

This subpart implements the policies set forth in FPR 1-1.12 concerning the responsibility of prospective contractors, minimum standards for responsible prospective contractors, requirements and procedures for the determination of responsibility, and policies regarding the determination of subcontractor responsibility.

§ 34-1.1203 Minimum standards for responsible prospective contractors.

§ 34-1.1203-2 Additional standards.

In addition to the standards set forth in FPR 1-1.1203-1 and -2, a prospective contractor, in order to be determined as responsible must, in the opinion of the contracting officer, meet the following standards as they relate to the particular procurement under consideration.

(a) Have an established system of accounting and financial controls which are determined by the contracting officer to be adequate to permit the effective administration of the type of contract proposed, particularly if under its terms the costs incurred are a factor in determining the amount payable under the contract, or if advance or progress payments are requested.

(b) In determining the adequacy of a prospective contractor's financial resources for the performance of the proposed contract, as required by FPR 1-1.1203-1(a), particular attention shall be given to the ability of the contractor to discharge full financial responsibility for charges and losses of Government-furnished material, when the contractor has responsibility for such material.

§ 34-1.1204 Determination of responsibility or nonresponsibility.

§ 34-1.1204-1 Requirement.

The signing of the contract shall be deemed to be evidence of the contracting officer's affirmative determination that a contractor is responsible within the meaning of FPR 1-1.1202. In the

event that a contracting officer determines a prospective contractor to be nonresponsible within the meaning of FPR 1-1.1202, a written determination to this effect shall be made by the contracting officer and placed in the contract file. (See FPR 1-1.708 if a small business concern is involved.)

Subpart 34-1.16—Reports of Identical Bids

§ 34-1.1603 Reporting requirements.

§ 34-1.1603-3 Submission of reports.

(a) In order to ensure expeditious submission, contracting officers shall forward reports required by § 1-1.1603 directly to the Attorney General, Ref. AT-IBR, Washington, D.C. 20530.

(b) A copy of each identical bid report shall be submitted promptly to the Assistant Secretary for Management or such other person as the Secretary may designate.

PART 34-2—PROCUREMENT BY FORMAL ADVERTISING

Subpart 34-2.2—Solicitations of Bids

Sec.
34-2.205 Bidders mailing lists.
34-2.205-2 Removal of names from bidders mailing lists.

Subpart 34-2.4—Opening of Bids and Award of Contract

34-2.406 Mistakes in bids.
34-2.406-3 Other mistakes disclosed before award.
34-2.406-4 Disclosure of mistakes after award.
34-2.407 Award.
34-2.407-8 Protests against award.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 45 FR 49039, July 22, 1980, unless otherwise noted.

Subpart 34-2.2—Solicitations of Bids

§ 34-2.205 Bidders mailing lists.

§ 34-2.205-2 Removal of names from bidders mailing lists.

Bidders mailing lists shall be reviewed annually to ensure that they contain only accurate and current information which is consistent with the present needs of the procurement office.

Subpart 34-2.4—Opening of Bids and Award of Contract

§ 34-2.406 Mistakes in bids.

§ 34-2.406-3 Other mistakes disclosed before award.

(a) Circumstances permitting the correction or withdrawal of bids are set forth in § 1-2.406-3.

(b) The Assistant Secretary for Management or such other person as the Secretary may designate makes administrative determinations in connection with mistakes in bid alleged after opening of bids and before award.

(c) Each administrative determination shall be approved by the Office of General Counsel.

(d)(1)-(2) [Reserved]

(3) The data required by § 1-2.406-3(d)(3) will be marked "IMMEDIATE ACTION—MISTAKE IN BID" and submitted, in duplicate, to the Assistant Secretary for Management or such other person as the Secretary may designate for evaluation and administrative determination. The file shall be assembled in an orderly manner and include an index of enclosures.

(4) Since examination of evidence is necessary to determine the proper course of action to be taken, no action will be taken on cases referred by telephone or telegraph.

(5) [Reserved]

(6) Where the evidence submitted by the bidder is incomplete or in need of clarification, the contracting officer shall document the file to indicate efforts to obtain clear and convincing evidence to support the alleged mistake.

(e) Doubtful mistakes in bid shall not be submitted by contracting officers directly to the Comptroller General for advance decisions, but shall be submitted as indicated in paragraph (d)(3) of this section.

§ 34-2.406-4 Disclosure of mistakes after award.

(a)-(c) [Reserved]

(d) The Assistant Secretary for Management or such other person as the Secretary may designate makes administrative determinations in connection with mistakes in bid disclosed after award.

(e) Each determination shall be approved by the Office of General Counsel.

§ 34-2.407 Award.

§ 34-2.407-8 Protests against award.

(a) *General.* (1) Contracting officers shall consider all protests or objections regarding the award of a contract, whether submitted before or after award, provided the protests are filed in a timely manner. As used in this subsection, the term "filed" means receipt in the contracting office or the General Accounting Office as the case may be. In order to be considered timely, protests based on alleged improprieties in any type of solicitation which are apparent before bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. In the case of negotiated procurements, alleged improprieties which do not exist in initial solicitations, but which are subsequently incorporated by amendment, must be protested not later than the next closing date for receipt of proposals following the incorporation. In other cases, protests shall be filed not later than ten (10) Federal Government working days after the basis for protest is known or should have been known, whichever is earlier. If a protest has been filed initially with the contracting officer, any subsequent protest to the Secretary, Department of Education or the General Accounting Office filed within ten (10) Federal Government working days of notification of adverse action will be considered provided the initial protest to the contracting officer was timely. Written confirmation of all oral protests shall be requested from protestants and must be timely filed. The protestant shall be notified in writing of the final decision on the protest, and the notification shall set forth the rationale upon which the decision is based.

(2) Reports concerning protests, whether before or after award, shall include the following documentation:

(i) A statement by the procuring activity's headquarters procurement staff office, containing its recommendation, with supporting reasons, as to the merits of the protest.

(ii) The contracting officer's statement of facts and circumstances including a discussion of the merits.

(iii) The contracting officer's conclusions and recommendations including documentary evidence on which they are based.

(iv) A copy of the IFB or RFP.

(v) A copy of the abstract of bids or proposals.

(vi) A copy of the bid or proposal of the successful offeror to whom award has been made or is proposed to be made.

(vii) A copy of the bid or proposal of the protestant, if any.

(viii) The current status of award. When award has been made, this shall include whether performance has commenced, shipment or delivery has been made, or a stop work order has been issued.

(ix) A copy of any mutual agreement to suspend work on a no-cost basis when appropriate (See § 1-2.407-8(c)).

(x) Copies of the notice of protest given offerors and other parties when the notice is appropriate (See § 1-2.407-8(a)(3)).

(xi) A copy of the technical evaluation report required by § 34-3.5104, when applicable, and a copy of each evaluator's rating for all proposals.

(xii) A copy of the negotiation memorandum when applicable.

(xiii) Any other documents which are relevant to the protest.

(xiv) The name and telephone number of the person in the procurement office who may be contacted for information relevant to the protest.

The file shall be assembled in an orderly manner and shall include an index of enclosures.

(3) Copies of the views of interested parties submitted pursuant to § 1-2.407-8(a)(3) shall be furnished to the Departmental Protest Control Officer.

(4) Whenever the contracting officer deems it desirable to obtain the views

of higher authority or when submission is required by paragraph (b)(2) of this section, the file shall be forwarded, in duplicate, through procurement channels to the Departmental Protest Control Officer, by the most expeditious means. The file shall be marked "IMMEDIATE ACTION—PROTEST BEFORE AWARD".

(b) *Protest before award.* (1) The contracting officer shall require written confirmation of any oral protest. To be considered timely, the written confirmation must be filed in accordance with paragraph (a)(1) of this section.

(2) In the following cases, written protests received by the contracting officer shall be forwarded, through procurement channels, to the Departmental Protest Control Officer. Files concerning these protests shall be submitted, in duplicate, by the most expeditious means and shall be marked "IMMEDIATE ACTION—PROTEST BEFORE AWARD":

(i) The protestant requests referral to the Secretary of Education;

(ii) The protest is known to have been lodged with the Comptroller General or the Secretary;

(iii) The contracting officer entertains some doubt as to the proper action regarding the protest or believes it to be in the best interest of the Government that the protest be considered by the Secretary or the Comptroller General.

Otherwise, submission of protests to the Departmental Protest Control Officer may be dispensed with by the contracting officer if the contracting officer is satisfied that the protest is without any reasonable degree of foundation. Except as modified in § 1-2.407-8(b)(3) and paragraph (b)(3) of this section, the contracting officer, with the concurrence of the procuring activity's protest control officer and the Office of General Counsel may disallow the protest.

(3) When it is known that a protest against the making of an award has been lodged directly with GAO, a determination to make award under § 1-2.407-8(b)(4) must be approved by the Assistant Secretary for Management or such other person as the Secretary may designate.

(4) If award is made pursuant to § 1-2.407-8(b)(4), the contracting officer shall document the file to explain the need for immediate award and shall notify the protestant and, as appropriate, others concerned, except GAO. Notice will be given to GAO by the Protest Control Officer.

(c) *Protests after award.* (1) The contracting officer shall require written confirmation of any oral protest. To be considered timely, the written confirmation must be filed in accordance with paragraph (a)(1) of this section.

(2) Protests submitted to the Secretary shall be forwarded, through procurement channels, to the Departmental Protest Control Officer and documented in accordance with paragraph (a)(2) of this section. The file shall be submitted, in duplicate, by the most expeditious means and shall be marked "IMMEDIATE ACTION—PROTEST AFTER AWARD."

PART 34–3—PROCUREMENT BY NEGOTIATION

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AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 45 FR 49041, July 22, 1980, unless otherwise noted.

Subpart 34-3.1—Use of Negotiation

§ 34-3.103 Dissemination of procurement information.

§ 34-3.103-50 Notifying and debriefing of unsuccessful offerors.

(a) *Policy.* (1) The policy of this Department is to provide a debriefing, when requested in writing, to an offeror that has unsuccessfully competed for an ED procurement. Requests for exceptions or deviations from debriefing policy and procedures shall be submitted to the Assistant Secretary for Management or such other person as the Secretary may designate for approval.

(2) A briefing is intended to:

(i) Tell an unsuccessful offeror which areas of a proposal were judged to be weak and deficient and whether the weaknesses or deficiencies were factors in the offeror not having been selected;

(ii) Identify the factors which were the basis for selection of the successful contractor. If the quality of the successful offeror's proposal to satisfy the mission requirement was the basis, the unsuccessful offeror should be so informed, and given a general comparison of significant areas, but not a point-by-point comparison of all the elements considered in the evaluation criteria. If the successful offeror was selected on the basis of cost, the unsuccessful offeror should be told that such is the case. If selection was based on other factors, they should be specified.

(3) If an unsuccessful offeror feels that a failure to obtain an award was not justified, the offeror will rely, at least in part, on the information received in the debriefing to determine whether to seek recourse. Accordingly, it is essential that a debriefing be conducted in a scrupulously fair, objective, and impartial manner, and that the information given the unsuccessful offeror be absolutely factual and consistent with the findings of the Contracting Officer and the basis on which the award was made.

(4) A debriefing should not reveal:

(i) Confidential or privileged commercial or financial information, trade secrets, techniques, or processes of the other offerors; and

(ii) The relative merits or technical standing of the unsuccessful offerors.

(b) *Procedures.* (1) Once a procurement action has been initiated, through the evaluation process, and even after the selection of a contractor, all queries as to the relative merits of the submitted proposals shall be courteously but firmly directed to the Contracting Officer. All other personnel will avoid exchange of comments with all offerors.

(2) If the procedures set forth in § 34-3.802-1 are utilized, and an award will be made within 30 days after a determination of the competitive range has been made, a preaward notification to offerors regarding whether their proposals are within the competitive range is not required. A preaward notification is required if the procedures set forth in § 34-3.802-2 are utilized or if it will take longer than 30 days after the determination of the competitive range has been made to make an award. The contract file must be documented to show when such a determination is made. If the alternate procedures (§ 34-3.802-2) are utilized, a preaward notification must be given to all offerors at the same time, as soon as practicable, after the determination of the competitive range has been made. The following is a sample preaward notification letter to those offerors considered to be not within the competitive range.

Subject: ED Request for Proposal (RFP) No. ———————————

LADIES AND GENTLEMEN: Your proposal submitted in response to the subject Request for Proposal (RFP) has been evaluated. Upon examination of your proposal in accordance with the criteria set forth in the RFP, it has been determined that the proposal is not within the competitive range, price and other factors considered. (A brief explanation of the reasons for this determination should also be included in the letter.) No further information is available at this time. You will be notified of any award(s) made as a result of the solicitation.

Notification will include the name of the successful offeror(s) and dollar amount of the resulting contract(s).

Since no further negotiations will be conducted with you concerning the subject RFP, no revision of your proposal will be considered.

Your interest in our requirements is appreciated.

Sincerely yours,

Contracting Officer.

The preaward notification to offerors whose proposals are outside the competitive range when the procedures specified in § 34-3.802-1 are utilized, need only state that the offeror's proposal was determined to be outside the competitive range and in general terms state the reasons for this determination. In any preaward notification to offerors whose proposals are not within the competitive range particular care should be taken to ensure that the offeror is advised that proposal revisions will not be considered. Whenever a preaward notification is required, the preaward notification to those in the competitive range need only state this fact. A postaward notification will be given to every unsuccessful offeror and it will include the name of the successful offeror(s) and dollar amount of the resulting contract(s). Upon request, in accordance with paragraph (a) of this section, unsuccessful offerors shall be furnished the reasons why their proposals were not accepted. Debriefings of unsuccessful offerors should be conducted only after award has been made. Debriefings may be given before award if the contracting officer determines it is in the best interest of the Government to do so and that such a debriefing would not harm the integrity of the procurement process. Any debriefing which is given before the

award of a contract shall be limited to a discussion of the unsuccessful offeror's proposal. Costs and prices proposed by other offerors will not be discussed at preaward debriefings.

(3) All ED employees who receive from an unsuccessful offeror a request, written or oral, for a debriefing shall immediately refer the request to the contracting officer. If the request is made orally the contracting officer shall require that the request be reduced to writing. The contracting officer or a designee shall be present at all debriefings and shall review written debriefings prior to release.

(4) In some cases it may be necessary to arrange informal debriefings for an unsuccessful offeror's personnel by ED evaluation participants. This determination will be made by, and meeting arrangements will be the responsibility of, the contracting officer.

(5) It is most important that all ED personnel engaged in the evaluation and selection process be aware of the foregoing policies and procedures. Detailed and complete records of the procurement will be maintained by key technical and contracting personnel in a manner which will facilitate either a written or an oral debriefing of any unsuccessful offeror.

(c) *Report.* When a debriefing is held, a brief report, summarizing the results of the debriefing, will be prepared and placed in the contract file.

Subpart 34-3.2—Circumstances Permitting Negotiation

§ 34-3.200 Scope of subpart.

The citation of authority under which a contract is negotiated shall be referenced to the statutory provisions, for example, the proper citation for use of the exception contained in § 1-3.211 of this title is: 41 U.S.C. 252(c)(11). The citation of authority to negotiate under other law (§ 1-3.215 of this title) shall be as prescribed in § 34-3.215.

§ 34-3.201 National emergency.

Limitations. This authority shall not be used for other than (a) assistance to labor surplus areas or small business concerns, and (b) administration of the Balance of Payments Program, without the prior written approval of the head of the procuring activity, or a designee.

§ 34-3.204 Personal or professional services.

Limitations. This authority shall not apply to the procurement of management consultant services.

§ 34-3.205 Services of educational institutions.

(a) [Reserved]

(b) *Limitations.* (1) This authority shall be used only for the procurement of specialized noncommercial services which are customarily performed by educational institutions. Use of this authority for any service other than those listed in § 1-3.205(a) of this title shall require a written determination with supporting facts by the head of the procuring activity that the particular type of service is available only from educational institutions.

(2) Proposals shall be solicited from as many educational institutions as are known to possess the required capability. This shall be consistent with § 1-3.101(c). Solicitation of a single educational institution shall require a written "Justification for Noncompetitive Procurement" in accordance with the requirements of Subpart 34-3.8.

(3) Where the circumstances of both paragraphs (f) (1) and (2) of this section pertain in the same case, the required determinations shall be combined and made by the head of the procuring activity.

§ 34-3.206 Purchases outside the United States.

This authority shall be used in preference to any other authority under the circumstances set forth in § 1-3.206 of this title.

§ 34-3.210 Impracticable to secure competition by formal advertising.

(a) *Application.* (1) Negotiation under § 1-3.210 of this title shall be conducted on a competitive basis to the maximum practicable extent; except, when negotiation is justified under the circumstances specified in § 1-3.210(a)(1) of this title.

(2) The illustration specified in § 1-3.210(a)(3) of this title shall apply only if the negotiation is for the identical requirements specified in the unresponsive bid. If specification deviations are authorized or if delivery, quantity, or other requirements are changed, the revised requirements shall be readvertised or, if appropriate, negotiated under one of the other authorities prescribed in Subpart 1-3.2 of this title.

(3) Cases of doubt in applying the illustration specified in § 1-3.210(a)(13) of this title shall be resolved in favor of formal advertising.

(b) *Limitations.* This authority shall not be used when negotiation is authorized by any other authority set forth in §§ 1-3.201 through 1-3.215 of this title.

§ 34-3.211 Experimental, developmental, or research work.

Limitations. Whenever more than single unit quantities of equipment or supplies are to be procured under this authority, the quantity shall be justified as reasonable and essential by the program authority submitting the procurement request.

§ 34-3.212 Purchases not to be publicly disclosed.

Limitations. This authority shall be used in preference to any other authority when competition is to be limited because of the need for nondisclosure (also see § 1-1.1003 of this title).

§ 34-3.215 Otherwise authorized by law.

When other statutory authority is the basis for negotiation, the proper citation for the contract is 41 U.S.C. 252(c)(15) plus the section number, title of the Act, and the Pub. L. number (or U.S.C. citation) of the statute which permits negotiation. For example, the proper citation in a contract for the procurement of expert and consultant service would be 41 U.S.C. 252(c)(15) and 5 U.S.C. 3109.

Subpart 34-3.3—Determinations, Findings, and Authorities

§ 34-3.301 General.

(a) Determinations and findings which authorize negotiation of contracts and determinations which support other procurement actions shall be made in accordance with § 34-3.303.

(b) Class determinations and findings shall be justified on the basis of need to avoid processing multiple determinations and findings when more than one contract must be negotiated under the same negotiation authority for the same program or project. The multiple procurements must be for items or services which are to be negotiated at or near the same time and are so related as to constitute a logical and distinct class. All class determinations and findings shall be limited to a period of 1 year or less, except that those determinations and findings required by § 1-3.211 may be authorized for 3 years.

§ 34-3.302 Determinations and findings required.

The following determinations in connection with the negotiation of contracts are required to be made in writing, supported by written findings.

(a) The determination required by section 304(b) of the Act (41 U.S.C. 254(b)) as to estimated cost of, and fees to be paid under, cost-plus-a-fixed-fee contracts (see §§ 1-3.401, 1-3.405-4, and 1-3.405-5(c)(2));

(b) The determination required by section 304(b) of the Act that the use of a cost or a cost-plus-a-fixed-fee contract or an incentive-type contract is likely to be less costly than other methods or that it is impracticable to secure property or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract (see §§ 1-3.404-4 and 1-3.405-1 of this title):

(c) The determination required by section 303(b) of the Act (41 U.S.C. 253(b)) that it is in the public interest to reject all bids:

(d) The determination required by section 305(c) of the Act (41 U.S.C. 255(c)) that the making of advance

payments would be in the public interest (see § 1-30.405 of this title);

(e) The determinations required with respect to waiving a requirement for the submission of cost or pricing data and the certification thereof (see § 1-3.807-3(b) of this title) and for the inclusion of the clauses required by §§ 1-3.814-1 through 1-3.814-3 of this title in contracts with foreign governments or agencies thereof.

(f) The determinations required by section 304(c) of the Act (41 U.S.C. 254(c)) and Subpart 1-6.10 of Part 1-6 with respect to omitting the clause specified in § 1-7.101-10 or § 1-7.602-7 of this title from contracts with foreign contractors or subcontractors regarding the right of the Comptroller General of the United States to examine the contractor's records when it is determined (1) that the omission will serve the best interests of the United States, or (2) that the public interest will best be served by the omission (see § 1-6.1001 of this title).

(g) Exceptions to the restrictions of the Buy American Act (41 U.S.C. 10(a-d) and determinations under the Balance of Payments Program; see Part 1-6 of this title.

(h) Use of time and materials or labor-hour type contract (see § 1-3.406 of this title).

(i) Acquisition of construction of equipment or facilities on property not owned by the United States pursuant to 42 U.S.C. 241(g).

(j) Use of letter contracts (see § 1-3.408).

§ 34-3.303 Determinations and findings.

The following determinations and findings shall be made by the Assistant Secretary for Management or such other person as the Secretary may designate:

(a) The determination required by § 1-3.211 of this title with respect to contracts which will require expenditure in excess of $25,000.

(b) The determinations required by §§ 1-3.212 of this title and 34-3.213 of this part.

(c) The determinations required by § 1-3.213 of this title.

(d) The determination required for the omission of the Examination of Records clause from contracts with foreign contractors or subcontractors (see § 1-6.1004 of this title).

(e) Determinations in accordance with § 1-6.103-3.

(f) The determination required by § 1-3.302(d) that the making of advance payments is in the public interest.

(g) The determination required by § 1-3.201 for reasons other than:

(1) Assistance to labor surplus areas or small business concerns, and

(2) Administration of the Balance of Payments Program.

(h) The determinations and findings required by §§ 1-3.202 and 1-3.214.

(i) The determinations and findings required by §§ 1-3.302(c) and 1-3.302(e).

(j) The determinations which support exceptions to restrictions of the Buy American Act (41 U.S.C. 10(a-d)) and the determinations and deviations required by Subpart 1-6.8 in administration of the Balance of Payments Program.

(k) All class determinations and findings.

(l) The determinations required by § 1-3.406 with respect to the use of time and materials and labor hour contracts.

§ 34-3.304 Determination and findings by the contracting officer.

The following determinations and findings shall be made by the contracting officer:

(a) The determinations required by §§ 1-3.207; 1-3.208, 1-3.210; and 1-3.215, if any.

(b) The determination required by § 1-3.211 for contracts not in excess of $25,000.

(c) The determinations required by § 1-3.302 (a) and (b).

(d) Any other determinations and findings not required to be made by higher authority.

Subpart 34-3.4—Types of Contracts

§ 34-3.405 Cost-reimbursement type contracts.

§ 34-3.405-5 Cost-plus-a-fixed-fee contract.

(a)-(b) [Reserved]

(c) *Limitations.* (1) [Reserved]

(2) Proposed fixed fees under cost-plus-a-fixed-fee contracts which exceed the following limitations shall be approved by the Assistant Secretary for Management or such other person as the Secretary may designate:

(i) Ten percent of the estimated cost, exclusive of fee, or any cost-plus-a-fixed-fee contract for experimental, developmental, or research work.

(ii) Seven percent of the estimated cost, exclusive of fee, of any other cost-plus-a-fixed-fee contract.

§ 34-3.408 Letter contract.

(a) *Definition.* A letter contract is a written preliminary contractual instrument which authorizes immediate commencement of work or services.

(b) *Policy.* The policy of the Department of Education is not to issue letter contracts. Exceptions to this policy will be permitted only in those cases where all matters of a substantive nature, such as statements of work, delivery schedules, and general and special clauses have been resolved and agreed upon.

(c) *Application.* A letter contract may be entered into only when: (1) The urgency of the requirement necessitates that the contractor be given a binding commitment so that work can commence immediately, (2) preparation of a definitive contract in sufficient time to meet Departmental requirements is not possible, and (3) prior approval has been obtained. (For approval levels, see paragraph (d) of this section.)

(d) *Approval.* Any letter contract must be approved by the Assistant Secretary for Management or such other person as the Secretary may designate.

(e) *Limitations.* (1) A letter contract shall not be entered into without competition when competition is practicable.

(2) A letter contract shall be superseded by a definitive contract at the earliest practicable date, but in no event later than 150 days after the date of execution of the letter contract.

(3) The maximum fund liability of the Government, stated in the letter contract, will be limited to only that amount determined essential to cover the contractor's requirements for funds prior to definitization.

§ 34-3.450 Unauthorized types of agreements.

§ 34-3.450-1 Letters of intent.

(a) *Description.* A letter of intent is an informal, unauthorized agreement between the Government and a prospective contractor which indicates that products or services will be produced after completion of funding and/or other contractual formalities. Such letters of intent are often solicited by prospective contractors or may be originated by Government personnel.

(b) *Policy.* (1) The practice of issuing letters of intent is not authorized by the Federal Procurement Regulations and is therefore prohibited. ED personnel shall not issue such letters for the following reasons:

(i) While such letters of intent may disclaim Government liability, they may induce potential contractors to initiate costly preparations in anticipation of contract award.

(ii) Procurements announced in such letters do not always materialize. The result may be costly to the Government, the prospective contractor, or both. If the author of the letter of intent is an authorized contracting agent of the Department, the Government may be bound by the action, even though the action is contrary to sound procurement practices and/or fiscal regulations. If the author of the letter of intent lacks procurement authority, the prospective contractor may incur substantial expenditures for which the contractor may not recover from the Government, but for which the contractor may seek to hold the unauthorized author personally liable. (See Subparts 1-1.4, of this Title and 34-1.4 of this chapter.)

(iii) The issuance of a letter of intent may violate the "Anti-Deficiency Act" (31 U.S.C. 665).

(2) It is recognized that potential contractors have a need to obtain procurement information at the earliest possible moment in order to make timely preparations. To this end, procurement personnel are expected to

move as efficiently and expeditiously as possible on all procurement actions. It is not permissible, however, to issue letters of intent to circumvent the requirements of FPR and EDPR.

(c) *Exceptions.* The prohibition against letters of intent does not preclude the award of contracts conditioned upon the availability of funds under conditions which warrant such contracts (see § 34-1.354 of this chapter).

§ 34-3.450-2 Memorandums of understanding.

(a) *Description.* A "memorandum of understanding" is an unauthorized agreement, usually drafted during the course of negotiations, to modify mandatory FPR and EDPR provisions in such a manner as to make them more acceptable to a prospective contractor. Such memorandums may bind the contracting officer and his successors not to exercise rights given the Government under the contract, or may contain other matters directly contrary to the language of the solicitation or prospective contractual document.

(b) *Policy.* Use of memorandums of understanding described in paragraph (a) of this section, is not authorized. Any change in a solicitation or contract shall be made by amendment or modification to that document. When a change to a prescribed contract clause is considered necessary, a deviation shall be requested.

Subpart 34-3.6—Small Purchases

§ 34-3.600 Scope of subpart.

This subpart prescribes the policies and procedures for purchases of supplies and nonpersonal services when the aggregate dollar amount in any one transaction does not exceed $10,000. Purchases not in excess of $10,000 which are accomplished in accordance with the policies and procedures of this subpart 34-3.6 shall be termed "small purchases." Small purchase methods included in this subpart include solicitations made either orally, or in writing using a SF-18, and award via Standard Form 147 (Order for Supplies or Services); Standard Form 44 (Purchase Order-Invoice-Voucher); Blanket Purchase Agreements (BPA), or Imprest Funds. Procurements not in excess of $10,000 which are accomplished by more formal negotiation methods other than those prescribed in this subpart and which are negotiated pursuant to 41 U.S.C. 252(c)(3), are also defined as small purchases. In arriving at the "aggregate dollar amount" involved, all supplies and services must be included which would be properly grouped together in a single advertisement for bids if the procurement were being effected by formal advertising. The amount of $10,000 includes the total price of the order including all estimated handling and freight charges to be paid to the prospective contractor. Requirements aggregating more than $10,000 shall not be broken down into several purchases which are $10,000 or less merely for the purpose of permitting negotiation or utilizing the small purchase methods authorized under §§ 1-3.6 and 34-3.6.

§ 34-3.601 Purpose and applicability.

(a) *Purpose.* The objective of the simplified small purchase methods prescribed herein is to reduce administrative costs to the extent possible within the limits of applicable laws and regulations.

(b) *Applicability.* (1) The policies and procedures in § 1-3.6 and this subpart shall not be used for the following:

(i) Procurements which are accomplished through delivery orders issued under indefinite delivery contracts, e.g., definite quantity contracts, requirements contracts, and indefinite quantity contracts.

(ii) Procurements made by formal advertising or negotiation other than by § 1-3.203, which were initially estimated to exceed $10,000, but ultimately resulted in a preaward price of $10,000 or less.

(iii) Small purchases which are initially estimated not to exceed $10,000, but ultimately result in a preaward price in excess of $10,000. If the price exceeds $10,000, the authority of 41 U.S.C. 252(c)(3) may not be used.

(iv) Construction requirements estimated to exceed $2,000. However, if

the initial estimate is $2,000 or less but the ultimate preaward dollar amount resulting from quotations received exceeds $2,000, but does not exceed $2,500, award may be made pursuant to the policies and procedures of § 1-3.6, this subpart, and the authority in 41 U.S.C. 252(c)(3) which is permitted by § 1-18.302. (See § 1-18.3 for policies and procedures pertaining to the procurement of construction by negotiation.)

(v) Procurement of architect-engineer professional services of any dollar amount. (See §§ 1-4.10 and 1-16.7 for policies, procedures, and forms pertaining to the procurement of A & E services.)

(2) This subpart does not preclude the use of bilateral purchase orders, Standard Forms 19 and 19B for construction contracts under $2,000 (see § 1-16.402-1), or a negotiated two-party formal contract for procurement not in excess of $10,000 where the procurement requires a specific contract provision relating to technical inspection or test, specification changes, government furnished property, insurance, patents, price adjustments, or the like.

§ 34-3.602 Policy.

(a) *Negotiation Authority.* Negotiated contracts or purchases aggregating $10,000 or less shall be made under the authority of 41 U.S.C. 252(c)(3) and § 1-3.203 rather than under any of the other sections in § 1-3.2. For example, small purchases for expert or consultant services shall be made under 41 U.S.C. 252(c)(3) and 1-3.203 rather than 41 U.S.C. 252(c)(15) and 5 U.S.C. 3109, and small purchases which are set-aside for small business unilaterally or jointly shall be made under the authority of 41 U.S.C. 252(c)(3) and 1-3.203 rather than 41 U.S.C. 252(c)(1) or 41 U.S.C. 252(c)(15). The negotiation authority shall be cited on the face of the Standard Form 147.

(b) Placement of small purchases with small business concerns, labor surplus area concerns, and minority business enterprises shall be encouraged to the extent consistent with the objectives of this subpart. When source lists are maintained for procurements of $10,000 or less, these source lists should include known concerns in these categories. These concerns and enterprises shall be given opportunities, at least equal to other firms, to submit quotations in response to small purchase solicitations.

(c) *Mandatory Sources.* Purchases shall be made in the open market only when requirements cannot be satisfied by requisition or order from mandatory sources in accordance with Part 1-5 or Federal Supply Schedule contracts in accordance with FPMR 101-26.4.

(d) *Limitations on the use of Small Purchase Methods.* (1) The contracting officer has the responsibility and authority to determine which purchase method is most suitable, efficient, and economical for use in meeting the immediate requirement.

(2) The small purchase methods are designed to procure defined, off-the-shelf, standard supplies, equipments, or services which may be awarded on the basis of a fixed price quotation. Small purchase methods should not be used to procure R & D, complex studies, services, and the like (which require judgmental technical evaluations and involved negotiations) where the award cannot be confidently made on the low price. Where procurements are not suitable for accomplishment using small purchase methods more formal negotiation methods or formal advertising should be used.

(3) Small purchases accomplished in accordance with this subpart may not be awarded on a cost-reimbursement basis.

(4) *Consultants.* Small purchase methods should be used with great prudence for the procurement of consultants to avoid the increased possibility at the higher dollar level of $10,000, of using consultants in an improper personal service capacity.

(5) Delegations of contracting officer authority for small purchases may be selectively increased from $2,500 up to $10,000 provided purchasing agents have met the selection requirements and have a working knowledge of the requirements of this subpart. Personnel responsible for making and approving small purchases should acquire formal training in this area.

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§ 34-3.603 Competition.

§ 34-3.603-1 Solicitation.

(a) Small purchases not exceeding $250 may be accomplished without securing competitive quotations where the prices are considered reasonable, but such purchases shall be distributed equitably among qualified suppliers. Records of purchases of $250 or less need not include justification for soliciting only a single source or a justification explaining how prices were determined to be reasonable. Operating agencies may reduce this limitation in accordance with agency requirements.

(b) For purchases between $250 and $2,500, solicitation generally may be limited to three suppliers.

§ 34-3.603-2 Data to support small purchases.

See § 1-3.603-2.

§ 34-3.603-50 Conduct of small purchases.

(a) *Purchases not in excess of $500.* (1) Competition. Purchases not in excess of $500 may be accomplished without securing competitive quotations. Such purchases are exempt from § 34-3.802-50 which requires a written justification for noncompetitive procurement. Purchases shall be distributed equitably among qualified sources. Purchases not in excess of $500 shall not be made repetitively to one source except for reasons which will clearly and convincingly justify a noncompetitive procurement in accordance with § 34-3.802-50. Where there are multiple sources available to provide an item or service, a quotation should be solicited from other than the previous source prior to placing a repeat order.

(2) Solicitation of Quotations. Quotations for purchases not in excess of $500 should usually be made orally but may be made in writing. If written solicitations are used, they must be accomplished in accordance with § 34-3.603-50(b)(6)(ii).

(3) Evaluation of price. The administrative cost of verifying the reasonableness of the price of purchases not in excess of $500 may more than offset potential savings in detecting instances of overpricing; therefore, action to verify the reasonableness of the price need be taken only when the buyer or contracting officer suspects that, or has information to indicate that, the price may not be reasonable, e.g., comparison to previous price paid, personal knowledge of the item involved. No written determination as to the reasonableness of the price is required except in instances where there is serious doubt as to the reasonableness of the price.

(b) *Purchases in excess of $500 up to $10,000.* The following describes the major considerations and steps involved in making purchases in excess of $500 up to $10,000.

(1) *Specification-statement of work.* The purchase requirement as described in a specification or statement of work must be clear and complete. Clarity is important to achieve effective competition because it enables all potential quoters to reach a common understanding of the requirement. A complete expression of the Government's requirement reduces potential misunderstandings in competitive procurements and increases the probability that the Government will receive what is actually required.

(2) *Notice of intention to make a service contract.* The requirement in § 1-12.905-3 to forward a Standard Form 98, Notice of Intention to Make a Service Contract, to the Department of Labor for any contract exceeding $2,500 also applies to small purchases over $2,500.

(3) *Competition.* Solicitation of competitive quotations from a reasonable number of qualified sources of supply shall be made to assure that the procurement is to the advantage of the Government, price and other factors considered. Generally, three is a reasonable number of sources for purchases in excess of $500 but under $5,000. More than three sources may be solicited at the discretion of the contracting officer. A reasonable number of sources for purchases of $5,000 up to $10,000 is a minimum of three. A maximum number cannot be specified apart from considering the nature of the requirement to be purchased.

(4) *Noncompetitive purchases.* Purchases in excess of $500 up to $10,000

which are made noncompetitively require justification as to why competition was not obtained. The justification, which may be in the form of a statement in the request for contract or requisition must address the considerations in § 34-3.802-50. The contracting officer may approve or disapprove the justification. Award of the contract or purchase order up to $10,000 by the contracting officer shall constitute approval of the justification.

(5) *Synopsis (1-1.10).* Small purchases of $5,000 and above shall be synopsized in the Commerce Business Daily in accordance with § 1-1.10 unless one of the exceptions in § 1-1.1003-2 applies. Synopses shall be sent to the Commerce Business Daily and due dates for receipt of quotations shall be timed so that there is a reasonable time for potential quoters to request RFQ's and submit quotations. Generally the synopsis should be mailed to the Commerce Business Daily 10 days prior to but not later than the day the SF-18 is released. Approximately 30 days should be planned between publishing of the synopsis and the due date for receipt of quotations. The synopsis should contain notice that the requirement is a small purchase.

(6) *Solicitation of quotations.* (i) Solicitations for purchases under $5,000 may be solicited either orally or in writing. Data to support oral solicitations shall be in accordance with § 1-3.603-2. Written solicitations should be used when (A) the sources are located outside the local area, (B) special specifications are involved, (C) a large number of items are included in a single proposed procurement, or (D) obtaining oral quotations is not considered efficient. Written solicitations for purchases under $5,000 shall be prepared in accordance with the following paragraph § 34-3.603-50(b)(6)(ii).

(ii) Written solicitations should be used for all purchases estimated to be $5,000 up to $10,000. Standard Form 18, Request for Quotations, shall be used for written solicitation of quotations in accordance with § 1-16.201. Written competitive solicitations shall contain the following elements as a minimum.

(A) Specification or Statement of Work.

(B) Delivery schedule.

(C) Quantity.

(D) Add the clauses as required by § 34-3.605-2(b)(3) and (4).

(E) Add the Certifications and Representations as required by § 34-3.605-2(b)(5).

(F) Cite the negotiation authority of 41 U.S.C. 252(c)(3).

(G) State the due date for receipt of quotations and include the provision prescribed by § 1-3.802-1 regarding consideration of late proposals.

(iii) Amendment of Request for Quotation—Prior to Closing Date.

(A) If after issuance of a request for quotations, but before the closing date of their receipt, it becomes necessary to make significant changes in quantity, specifications, delivery schedules or any change in closing dates, or to correct a defect or ambiguity, such change shall be accomplished by issuance of an amendment to the request. Requests for quotations using the SF-18 may be amended by letter. Oral requests for quotations may be amended orally.

(B) When it is considered necessary to issue an amendment to a request for quotations, the period of time remaining before closing and the need for extending this period by postponing the time set for closing must be considered. Where only a short time remains before the time set for closing, extension of time may be made by telegram or telephone Such notification should be confirmed in the amendment.

(C) Any information given to one potential quoter concerning a request for quotations shall be furnished promptly to all other potential quoters in an amendment to the request, if such information is necessary to potential quoters in submitting quotations, or if the lack of such information would be prejudicial to uninformed potential quoters.

(7) *Late quotations.* The policy of § 1-3.802-1, *Consideration of Late Proposals,* is made applicable by this regulation to written small purchase quotations received after the time set for

receipt at the purchasing office. Any oral quotation received at the purchasing office after the time set for receipt shall not be accepted. Because late written quotations shall not be considered except as provided for in § 1-3.802-1 it is important to allow potential quoters enough time to submit their quotations.

(8) *Selection of quoter for award.* Awards will be made to the lowest responsible quoter.

(9) *Evaluation of price.* Some form of price or cost analysis should be made on each small purchase over $500 to determine that the proposed price is reasonable in accordance with the guidance in § 1-3.807-2. When competitive quotations are received and award is made to the lowest priced quoter, and the contracting officer concludes that the lowest price is reasonable, no written determination of price reasonableness is required. When other than the lowest quotation is used as the basis for the purchase, the reason(s) for rejecting the lower quotation shall be included in the purchase order file by notation on the worksheet or by a separate memorandum. When only one quotation is received, a written determination of price reasonableness is required.

(10) *Award documents.* (i) Small purchase awards shall generally be made using the Standard Form 147 in § 1-16.301-2. If special conditions require, a two party formal contract may be issued under $10,000.

(ii) Clauses required by § 34-3.605-2(b)(3) and (4) shall be incorporated in the SF-147 by reference or shall be physically attached.

(iii) *Modifying a purchase order.* (A) Standard Form 30 or other functionally equivalent forms shall be used to modify the purchase order for administrative or other changes.

(B) Modifications making administrative changes such as the correction of typographical errors, changes in paying office and changes in accounting and appropriation data do not require contractor acceptance. In addition, the issuance of no cost amended shipping instructions which modify unilateral purchase orders and which have been concurred in by the contractor by telephone or letter do not require contractor acceptance by signature on the Standard Form 30.

(C) To otherwise modify the purchase order, and if not previously included in the purchase order, the changes clause in § 1-7.102-2 shall be incorporated in the Standard Form 30 (Amendment of Solicitation/Modification of Contract), and the contractor acceptance obtained by his signature on the Standard Form 30. Subsequent changes pursuant to the Changes clause shall not require contractor acceptance. However, other modifications outside the scope of the changes clause, such as the addition of the Government Property Clause, shall require contractor acceptance by signature on the Standard Form 30.

(iv) *Termination of purchase orders.* A purchase order which has not been accepted in writing or by delivery by the prospective contractor may be withdrawn or canceled by the contracting officer any time prior to acceptance. Notice of withdrawal or cancellation shall be in writing and shall request the prospective contractor's acknowledgement thereof. If the contractor has accepted the purchase order in writing or on a subsequently issued Standard Form 30, and it later becomes necessary to terminate the purchase order, the contractor should be asked to agree to cancellation of the order without cost or liability to either party. If the contractor agrees, the cancellation shall be effected by use of Standard Form 30, as a No-Cost settlement in accordance with § 1-8.209-4, signed by the contracting officer and the contractor. If the contractor does not agree to a no-cost settlement of a purchase order which has been accepted, termination of a purchase order will be processed in accordance with the Termination for Convenience clause and Part 1-8 of Title 41.

(11) *Debriefings and notification of unsuccessful quoters.*

(i) Debriefings shall be provided in accordance with § 34-3.103-50 to unsuccessful quoters upon their request.

(ii) The notification of unsuccessful offerors in § 34-3.103-50(b)(2) is not applicable to procurements of $10,000 or less.

(12) *Protests.* There is nothing which prevents a quoter or an interested party from protesting against the placement or manner of handling a small purchase. Protests against small purchases shall be processed in accordance with § 34-2.407-8.

(c) *Close out.* Purchasing offices shall initiate the close out of small purchase files upon determination by the office accumulating the file that the order is complete. An order is completed when (1) the contractor has completed the required deliveries or supplies and the Government has inspected and accepted such supplies, (2) the contractor has performed all services and the Government has accepted such services, or (3) notice of termination has been given to the contractor by the Government or the parties mutually agree to a no cost cancellation. Rental, use, and storage agreements shall be considered to be complete when a notice of termination has been issued or the period has expired.

(d) *Reports of small purchases.* [Reserved]

§ 34-3.605 Purchase order forms.

§ 34-3.605-1 Standard Form 44, Purchase Order-Invoice-Voucher.

(a)-(c) [Reserved]

(d) *Instructions for use.* The responsible procurement office will instruct the user as to limitations and procedures for use of SF-44 as outlined in 1-3.605-1.

(e) *Agency implementation.* Since SF-44 is an accountable form, a record shall be maintained of serial numbers of forms, to whom issued and date issued. SF-44's shall be kept under adequate lock and key to prevent unauthorized use. A reservation of funds shall be established to cover total anticipated expenditures prior to use of SF-44.

§ 34-3.605-2 Standard Forms 147 and 148, Order for Supplies or Services.

(a) *General.* SF-147 and SF-148 are mandatory for use in the Department as the standard purchase order forms for small purchases not in excess of $2,500.

(1) [Reserved]

(2) SF-147 and 148 are mandatory for use in the Department as the standard purchase order forms for small purchases not in excess of $10,000.

(b) *Terms and conditions.*

(1)-(2) [Reserved]

(3) The following terms and conditions shall be added or otherwise incorporated by reference whenever Standard Forms 18 and 147 are used for small purchases in excess of $2,500:

(i) *Examination of records by Comptroller General.* § 1-7.103-3.

(ii) *Listing of employment openings.* § 1-12.1102-2.

(iii) *Employment of the handicapped.* § 1-12.1304.

(iv) *Termination for convenience of the government.* § 1-8.705.

(4) The following terms and conditions shall be added or incorporated by reference whenever required by the Federal Procurement Regulations:

(i) *Utilization of small business concerns.* § 1-1.710-3(a). (All actions which may exceed $5,000.)

(ii) *Utilization of labor surplus area concerns.* § 1-1.805-3(a). (All actions which may exceed $5,000.)

(iii) *Utilization of minority business enterprises.* § 1-1.1310-2(a). (All actions which may exceed $5,000.)

(iv) *U.S. products and services (Balance of Payments Program).* § 1-6.806-4. (All actions subject to the Balance of Payments Program in excess of $2,500.)

(v) *Contract work hours and Safety Standards Act.* § 1-12.303. (All actions in excess of $2,500 which are not subject to the Service Contract Act of 1965.)

(vi) *Service Contract Act of 1965.* § 1-12.904-1. (Service contracts in excess of $2,500.) For services contracts not exceeding $2,500 use the clause in § 1-12.904-2.

(5) The following are the Certification requirements applicable to small purchases when the SF-147 is used.

(i) *The Certification of independent price determination.* § 1-1.317 is not applicable to small purchases.

(ii) *The Buy American Certificate.* (§ 1-6.104-3).

(iii) Labor Surplus Area Representation should be obtained when a labor surplus area set-aside has been made

and for use in deciding between equal priced quotations.

§ 34-3.606 Blanket purchase arrangements.

§ 34-3.606-1 Documentation.

Each blanket purchase arrangement (BPA) shall be documented by issuance of a contractual instrument appropriately numbered. Each BPA shall contain the following provisions:

(a) Authorization to the supplier to furnish the supplies or services described in general terms, when ordered by authorized personnel listed therein.

(b) A statement that individual orders will not exceed $5,000 per call.

(c) A statement that the Government will be obligated only to the extent of the calls placed against the BPA by authorized personnel.

(d) A stipulation that the supplier's established discounts will apply to calls placed against the BPA.

(e) A requirement that all shipments be accompanied by delivery tickets containing the name of the supplier, BPA number, call number, date of call, name of individual placing the call, an itemized list of supplies or services furnished including unit price and extension of each item, applicable discount, date of delivery and the signature of the Government employee receiving the item or service.

(f) A requirement that the supplier shall submit an itemized invoice at least once each month or upon expiration of the BPA, whichever occurs first, covering all deliveries made during the billing period for which payment has not been received.

(g) Each BPA shall cite 41 U.S.C. 252(c)(3) as authority for negotiation.

§ 34-3.606-5 Agency implementation.

(a) The procurement office shall review the blanket purchase arrangement files at least annually to assure that authorized procedures are being followed. In addition, the procurement office shall review and update as required each blanket purchase arrangement at least annually.

(b) Delivery tickets signed by the Government employee receiving the item or service will be forwarded to the fiscal office or other paying office as designated by the operating agency. Payment will be made on the basis of the delivery tickets and properly itemized invoice. Procurement activities will ensure that established procedures allowing for availability of funds are in effect prior to placement of orders.

(c)(1) Competition under BPAs will be obtained in accordance with EDPR 34-3.603-1(a) and (b): When concurrent agreements are in effect for similar items, orders not in excess of $250 shall be equitably distributed. Where there is an insufficient number of BPAs for any given class of supplies or services to assure adequate competition on orders in excess of $250, the individual placing the order shall solicit quotations from other sources.

(2) Individual orders shall be recorded in simple form as determined by the operating agency. Orders will be numbered in sequence in a separate series for each BPA and will consist of the BPA number followed by the serial number of the order.

(d) [Reserved]

(e) Delivery tickets signed by the Government employee receiving the item or service will be forwarded to the fiscal office or other paying office as designated by the operating agency. Payment will be made on the basis of the signed delivery tickets and properly itemized invoice. Procurement activities will ensure that established procedures allowing for availability of funds are in effect prior to placement of orders.

(f) [Reserved]

(g)(1) Competition under BPA's will be obtained in accordance with § 34-3.603-50(a)(1) and (b)(3). When concurrent agreements are in effect for similar items, orders not in excess of $500 shall be equitably distributed. Where there is an insufficient number of BPA's for any given class of supplies or services to assure adequate competition on orders in excess of $500, the individual placing the order shall solicit quotations from other sources in addition to the BPA source(s), or establish additional BPA's.

(2) Individual orders shall be recorded in simple form as determined by the operating agency. Orders will be

numbered in sequence in a separate series for each BPA and will consist of the BPA number followed by the serial number of the order.

Subpart 34-3.8—Price Negotiation Policies and Techniques

§ 34-3.802 Preparation for negotiation.

§ 34-3.802-2 Alternate procedures for consideration of late proposals.

(a) The Assistant Secretary for Management or such other person as the Secretary may designate shall make the determination set forth in § 1-3.802-2.

(b)-(e) [Reserved]

(f) Generally, contracting officers, assisted by audit or pricing personnel, will be able to make a determination of the significance of any reduction in cost or price to the Government offered by a late proposal. In order to determine if a late proposal offers a significant technical advantage to the Government, the contracting officer will first obtain a written statement from the individual responsible for the technical evaluation of proposals. The statement must clearly demonstrate that it is advantageous to the Government to consider the late proposal. It must also state what the proposal's significant advantages are and why they are important to the Government. This statement must be approved at a level equal to that of Division Director of the Program Office. The contracting officer will make the determination whether or not to consider the late proposal based on the data set forth in the statement from the individual responsible for the technical evaluation of proposals.

(g) Determination of the competitive range shall be made in accordance with § 34-3.5107. Debriefings of unsuccessful offerors shall be made in accordance with § 34-3.103-50.

§ 34-3.802-50 Noncompetitive procurements.

(a) *Purpose.* This subsection states the policies and procedures applicable to all noncompetitive procurements. It describes the criteria for use in determining whether a procurement may be made noncompetitively, describes the justification documents required, and prescribes review and approval requirements.

(b) *Policy.* (1) All negotiated procurements will be conducted competitively as required by FPR 1-1.301-1, 1-1.302-1(b), and 1-3.101(d) unless there are compelling and convincing reasons and/or circumstances which justify a noncompetitive procurement. Procurements should be conducted competitively to obtain the benefits of competitive prices and to stimulate bidders, offerors and current contractors who desire contracts to exert their best efforts to deliver high quality physical and conceptual products. Although competition is the rule, it is recognized that there are certain instances where a noncompetitive procurement may be necessary. Where a noncompetitive procurement can be justified, affirmative action must be taken whenever possible to avoid the need for subsequent or continuing noncompetitive procurements.

(2) Submission of an unsolicited proposal can also lead to a noncompetitive procurement. In this circumstance, the initiating program office may recommend, for approval by the appropriate authority listed in paragraph (i) of this section, that a noncompetitive procurement be made to only one organization or individual to perform the required work or services. This recommendation shall be in writing and prepared as a document entitled "Justification for Acceptance of Unsolicited Proposal" that shall set forth information required by § 34-4.5203-3. A solicitation for a noncompetitive procurement shall not be issued, and negotiations with a source that submitted an acceptable unsolicited proposal shall not be undertaken, in advance of approval in accordance with § 34-3.802-50(i).

(c) *Exceptions.* The provisions of this subsection will apply to all negotiated procurements except:

(1) Procurements of $500, or less (see § 34-3.603-50(a));

(2) Procurements of professional services, e.g., for physician, veterinarian, dentist, or legal services negotiated under the authority of 41 U.S.C. 252(c)(4), or where the foregoing kinds of services are for $10,000 or less and

are negotiated under 41 U.S.C. 252(c)(3) (see § 34-3.603-50(b)(4));

(3) Procurement of architect-engineer services (see § 1-4.10);

(4) Procurement of utility services where the services are available from only one source;

(5) Acquisitions from or through other Federal Government agencies, e.g., interagency agreements, contracts with the Small Business Administration pursuant to section 8(a) of the Small Business Act.

(d) *Competitive Procurement.* A procurement is competitive when the Government provides the opportunity to more than one source to submit bids, offers, or quotations. If a procurement is announced in a presolicitation synopsis which states where copies of solicitations may be obtained, provides the opportunity for interested sources to submit bids, offers, or quotations, provides adequate time for requests for solicitations and submission of responses, and describes the procurement requirement without restrictions which would unavoidably result in only one source being responsive, the procurement will be classified as competitive.

(e) *Classification of procurements.* (1) The issuance of a sources sought synopsis does not require classification of a procurement as competitive or noncompetitive. The data resulting from the sources sought synopsis must be evaluated to determine whether there is more than one source which can adequately perform the contract requirement. If there is more than one source, the procurement should be classified as competitive and a presolicitation synopsis making solicitations available should be issued. If there is only one source resulting from the sources sought synopsis, this data may be used to support a justification for noncompetitive procurement. (The term "sources sought synopsis" includes advance notices in accordance with § 1-1.1003-3, and other similar types of notices which are used to determine the availability of interested potential sources. A sources sought synopsis does not permit potential sources to request solicitations and therefore is merely an opportunity for the marketplace to indicate its interest in submitting bids, offers, or quotations for a future procurement.)

(2) The decision to classify a specific procurement as competitive should be made at the point in the procurement process prior to issuance of a presolicitation synopsis where required, or solicitation(s) where a presolicitation synopsis is not required. This classification is fixed throughout the procurement's life and may not be subsequently altered even though only one offer is received.

(f) *Criteria.* Criteria are provided below for use in deciding whether a proposed noncompetitive procurement is justified. The critical question to be answered in each justification is why the opportunity to meet a procurement requirement cannot be made available to more than one source. It is critical to justify a noncompetitive procurement that reasonable, informed opinions supported by available facts be provided. Each of the criteria is illustrative of possible reasons. Short of giving the marketplace an opportunity to speak for itself with respect to its capabilities and available sources, the value of the supporting statements and opinions in a justification must be judged by the extent to which the opinions reflect accurate and knowledgeable judgments about the marketplace. The more facts that are offered and the more knowledgeable the opinions about the marketplace are, the greater is the support to conclude that a noncompetitive procurement is justified. If the contracting officer or approving officials conclude that support offered to justify a noncompetitve procurement is not convincing, or where there is some unresolved doubt, the doubt should be settled by permitting the marketplace to speak for itself by issuing a sources sought synopsis. As each justification for noncompetitive procurement is reviewed against these criteria, the reviewer should ask why the procurement cannot be competed, are there sufficient grounds for excluding all other actual or potential offerors, what action can be taken to obtain competition in the instant procurement, and what action is needed to avoid the need for a subsequent or a

continued noncompetitive procurement?

(1) There is only one source in existence which can perform the contract requirements. The existence of one source for the purposes of this regulation should be a matter of fact, and not a matter dependent upon the relative and limited knowledge of sources known by the project or contracting officers. This criterion may not be used to justify a noncompetitive procurement prior to testing the marketplace by issuing a sources sought synopsis. Such a sources sought synopsis should state that the Government knows of only one source who can do the work, state the name of the source, and the work required. If only one source submits a response to the sources sought synopsis, this data may be used to support a justification for noncompetitive procurement.

(2) One source controls copyrights, patent rights, trade secrets, technical data, secret processes, or other proprietary data which are essential to the performance of the contract requirements and the source refuses to license or otherwise make the foregoing data available to other sources, and the requirement cannot be revised to allow other sources to compete who do not have access to the foregoing data. Factual information should be provided to support the use of this criterion such as the citation of copyrights, exactly what is covered by the copyright or other data which is necessary to the contract performance, and why the requirement cannot be revised to permit competition. The mere existence of such rights does not in and of itself justify noncompetitive procurement. It must be shown that the Government cannot meet its requirement(s) without the use of the proprietary data. Any doubts should be resolved by summarizing the procurement requirement and issuing a sources sought synopsis. When this criterion is to be utilized the approving official will obtain legal advice from the OGC.

(3) One source or individual has a truly unique idea, approach, or equipment which has no like or equal and is the only known item which can meet the Government's needs. Unsolicited proposals are excluded from the provisions of this paragraph and shall be processed in accordance with Subpart 34-4.52. Except in very rare cases, the fact that a proposer submits a proposal containing a unique idea or approach does not, in itself, justify a noncompetitive procurement. Mere claims of uniqueness must not be pointed to in justifications for departures from regulatory requirements for competitive procurements. There may be other potential sources with equally suitable approaches or ideas which could accomplish the same end results. Except in cases which are convincingly supported by a panel opinion or a consensus of experts who are very familiar with the sources available in the marketplace, the opinion of uniqueness should be tested. The claim that the unique item is the only one which can meet the Government's needs should be based on the objective requirements of the Government not the personal preferences of the originator. Where a test of the claim of uniqueness becomes appropriate, the project officer should draft a description of the agency's requirement that does not compromise the unique idea or proprietary data of the proposer, and the procurement office shall issue a sources sought synopsis. If the only acceptable response to the sources sought synopsis is the organization or individual which the Government originally believed had a unique offering, this data may be used to support a justification for noncompetitive procurement.

(4) A specific item or equipment must be obtained as part of an agency's program responsibility to test and evaluate certain kinds and types of products. This criterion is limited to testing and evaluation purposes only and may not be used for initial outfitting or repetitive procurements. Project officers should support the use of this criterion with citations from their agency's legislation and the technical rationale for the item or equipment required.

(5) Only one source has complex or specialized physical facilities or equipment which by reason of exclusive use, access or ownership, or by reason of clear superiority to facilities and

equipment available to other sources is capable of adequately meeting the technical requirements of the contract. The success of the contract objective is critically dependent upon the use of the facilities and equipment of this one source. Specific details should be provided as to why the facilities or equipment are mandatory for the contract performance and why the facilities and equipment of other contractors cannot meet the contract requirements. This criterion should not be used to justify a noncompetitive procurement without first defining what equipment or facilities is needed and issuing a sources sought synopsis asking for sources with comparable equipment and facilities. If no other qualified sources respond, then this data may be used to support the justification of a noncompetitive procurement.

(6) Government-owned facilities which are essential to performance of the contract are available to only one source. Efforts should be made to determine from the cognizant Government agency whether the Government-owned facilities can be made available to more than one source. Then a noncompetitive procurement may be justified.

(7) Full and free competition is precluded because of geographic, socioeconomic, or epidemiologic considerations necessarily associated with the procurement. This criterion is intended to recognize certain limits to achieving full and free competition which sometimes follow from certain program legislation and special program requirements. This criterion may not be used in the absence of such established limits and only where it can be shown that there is only one source which can perform the particular procurement.

(8) The required services must be procured from a certain State, interstate, or local government unit, or from a nonprofit organization comprised of representatives of such governmental units or of their officers, which organizations or units are unique bodies without like or equal in being able to meet the contract requirements. This criterion is intended to recognize that in certain cases where dealing with governmental entities or their representatives, there is in fact only one entity available to perform and/or the entity has a unique ability to accomplish the work. This criterion should not be used to obtain supplies or services which are or can be provided from the commercial marketplace. Where there is more than one such unit or organization which can meet the contract requirements, a noncompetitive procurement cannot be justified, unless a Federal or State statute dictates the source. The fact that the government units or other nonprofit organizations may offer a lower price or agree to cost share, is not adequate reason to justify a noncompetitive procurement to the exclusion of others.

(9) *Time is of the essence* and only one known source can meet the Government's needs within the required time frame or time would not permit the testing of a product offered by a source other than a sole source to meet the delivery schedule. However, the recognized extreme of public exigency in § 1-3.202 is not to be taken lightly. It contemplates a need which is compelling and of unusual urgency, as when the Government would be seriously injured financially or otherwise, if the property or services to be purchased or contracted for were not furnished by a certain time, and when they could not be procured by that time by means of formal advertising. This applies irrespective whether that urgency could or should have been foreseen. Examples are when property or services are needed at once because of a fire, flood, explosion, or other disaster. Public exigency or other reasons causing situations where time is of the essence, may not be used to justify noncompetitive procurement without first showing that a limited competition using abbreviated procedures is impossible. If a limited competition is impossible, it must be shown that the recommended contractor possesses the unique capability to perform the required work on time to the exclusion of all other firms. The considerable latitude of the contracting officer to determine the method best suited to satisfy the urgent need is limited by the need to try and achieve a limited

competition if at all possible and, if not, to determine that one contractor is uniquely able to meet the Government's requirements in time.

(10) There is existing equipment which for reasons of compatibility and interchangeability, requires an item which is manufactured only by one source. This criterion is for use in procurements where a particular brand name item is required and an "or equal" will not meet the Government's requirements. This criterion may not be used where there are other manufacturers available who may be able to produce acceptable items even though their products might require some adjustments and modifications. Such other manufacturers must be given the opportunity to compete.

(11) The segments of the project are so intertwined that it is impossible to successfully accomplish the project objectives if all segments are not procured from the same contractor. This criterion is intended for use under research and development procurements as well as studies. It can only be used where there is a necessity to procure the project as a whole package in order to successfully complete the project. This criterion can not be used where segments of the project can be completed separately. The possibility, by itself, that additional work may be done more conveniently or even at less expense by the original contractor is not sufficient reason to justify a noncompetitive procurement using this criterion.

(g) *Procedure.* (1) Program offices should discuss prospective noncompetitive procurement requests with the procurement offices as early as possible during the procurement planning stage (see Subpart 34-3.50), preferably before submitting the requisition or request for contract. Such discussions may resolve uncertainties, provide program offices with names of other sources, allow proper scheduling of the procurement, and avoid delays which might otherwise occur should it be determined that noncompetitive procurement is unjustified.

(2) When a program office desires to obtain certain goods or services by contract without competition, it shall, at the time of forwarding the request for contract furnish the procurement office a "Justification for Noncompetitive Procurement" prepared in accordance with this subsection. All justifications shall be submitted initially to the contracting officer.

(3) A contracting officer who receives a justification for processing shall ascertain whether the document is complete; shall request advice from pricing, audit, legal, and other staff offices as appropriate; shall forward the justification including a recommendation and/or concurrence to the appropriate approving official. If noncompetitive procurement is disapproved, the contracting officer shall promptly so notify the program office concerned.

(4) All required approvals shall be obtained prior to issuing a solicitation to, or commencement of contract negotiations with the proposed contractor. Preliminary arrangements or agreements with the proposed contractor not made by the contracting officer will have no effect or influence on the rationale to support a noncompetitive procurement.

(5) It is the responsibility of the approving official to determine whether a contract may properly be awarded without competition. Program offices and project officers are responsible for furnishing contracting officers and other approving officials with pertinent factual information and opinions necessary to make such determinations. Other staff offices shall advise the contracting officer and approving official as requested.

(h) *Format.* (1) The justification for noncompetitive procurement in excess of $10,000 will be a separate, self-contained document. Justifications for noncompetitive procurements of $10,000 or less may be a statement in the requisition or request for contract.

(2) Justifications for noncompetitive procurement whether over or under $10,000 shall fully express what is to be procured and the reason why the requirement should not be competed. Justifications must offer reasons which go beyond inconvenience and must explain why it is impossible to obtain competition. The justification will be documented only with information that is based on facts rather than untested and unsubstantiated conclu-

sions or opinions. Documentation in the justification should be sufficient to permit an individual with technical competence in the area to follow the rationale.

(3) Justifications have two parts.

(i) Part I contains background information about the program and a description of the procurement. The following information should be included:

(A) Date.

(B) Agency, program office, and project officer (name, address, and telephone number).

(C) Project identification (Program legislation including citations or other internal program identification data such as title, contract number, etc.).

(D) Descriptive title of the project. Attach a full description of the contract requirement. This may be a specification, purchase description, or statement of work. If the "whole project buy" (see § 34-3.802-50(j) for explanation of "whole project buy" concept) as contemplated at the outset is expected to exceed $100,000, a procurement plan as required by Subpart 34-3.50 shall be prepared by the project officer and attached to the justification. The description of the whole project buy must include what is being bought, the estimated cost of the whole or component parts, phases, options, continuations, etc., and the periods of time involved. The description is critical to the approving official's understanding of what the approving official is being asked to approve, and subsequent use of the approval by the procurement or project offices.

(E) Explain whether the instant procurement is an entity in itself, whether it is one in a series, or part of a related group of procurements.

(F) Proposed contractor (name and address).

(ii) Part II includes the facts and reasons to justify a noncompetitive procurement. Part II should begin with the statement:

I recommend that this procurement be noncompetitively negotiated with ———— (Name of proposed contractor) in the amount of ———— (Amount) for the following reasons:

Each of the applicable criteria listed in § 34-3.802-50(f) must be addressed and specific support for its use must be included. At the end of Part II signatory lines should be provided as follows:

Recommended ———— Project Officer Date ——
Concur ———— Project Officer's Immediate Supervisor Date ——
Concur ———— Contracting Officer Date ——
Approved ———— Approving Officer Date ——

(i) *Review and Approvals.* Justifications for noncompetitive procurement shall be reviewed as follows:

(1) For small purchases over $500, but not over $10,000, the "justification", which must address the criteria in § 34-3.802-50(f), may be in the form of a statement within the requisition or request for contract. The contracting officer may approve or disapprove the justification. If the contracting officer awards the contract or purchase order up to $10,000 as requested, such award shall constitute the contracting officer's approval of the justification.

(2) For procurements over $10,000, but not over $100,000 the justification shall be submitted through the contracting officer who will add a recommendation and forward to the chief of the procurement office for approval. Where the chief of the procurement office and the contracting officer are the same individual, the approval level will be at one administrative level above the chief of the procurement office.

(3) All procurements $100,000 or over shall be submitted through the contracting officer for approval by the Noncompetitive Procurement Review Board, unless the Secretary or Under Secretary or such other person as the Secretary may designate determines that the Board will not be used, in which case the Assistant Secretary for Management or such other person as the Secretary may designate shall be the approving official.

(4) The reasons for a determination to disapprove the justification for a noncompetitive procurement shall be stated in writing by the official responsible for making the determination.

(j) *Whole Project Buys.* (1) A "whole project buy" is a project consisting of

any number of procurements which is conceived as a single entity for planning and budgetary purposes. The whole project buy concept should not be limited to only that part of the whole project which is the subject of the current contract when contracts to be awarded in the future are part of the same project.

(2) Any whole project buy which exceeds $100,000 in the aggregate which contemplates any noncompetitive procurement actions of any dollar value at any time during the project life shall be submitted to the review board or approving official for approval.

(3) This requirement applies even if the first of a series of related procurements in a whole project buy is less than $100,000. This includes projects with several related procurement actions where the first part of the project is competitively or noncompetitively awarded, and there are to be subsequent noncompetitive procurements with the original contractor. This requirement applies to all procurements regardless of whether the noncompetitive procurement is called a renewal, follow-on, continuation, extension or the like, or is effected by means of a contract modification or is a new start.

(4) Justifications of whole project buys submitted to the review board or approving official shall fully describe what the whole requirement is, how the requirement will be divided into procurement actions, the total estimated cost of the project whole and each individual procurement action, the total period of time for the project whole and each procurement action, and whether all or only part of the project whole will be procured noncompetitively. For certain projects, as in the case of basic research, where an end point cannot be forecast with certainty, the whole project buy will be the circumscribed amount of time which the program office presently intends to continue a certain effort.

(5) If the review board or approving official clearly approves the noncompetitive procurement action(s) at the outset of a whole project buy, and the whole project buy results in an original contract followed by either a noncompetitive new contract, or noncompetitive modifications to the original contract for work, dollars, and time approved by the board or approving official at the outset, these subsequent noncompetitive procurement actions will not have to be resubmitted for approval. Once the noncompetitive procurement actions for the whole project buy are approved, no subsequent approvals of the individual procurement actions are required. Whole project buys may not be approved in excess of 3 years before a subsequent review is required. Approval is limited to that explicitly contained in the justification. If a part of the "whole project buy" is not included in the justification or there are changes in the project which change the whole project buy as approved, the excluded part and/or changes will require separate review and approval. Doubts as to what was approved shall be submitted to the review board or approving official for clarification. Noncompetitive increases for new work to contracts in effect at the time this regulation becomes effective which are part of a whole project buy exceeding $100,000 shall be submitted to the review board or approving official for approval prior to taking the noncompetitive action.

Subpart 34-3.50—Procurement Planning

§ 34-3.5000 Scope of subpart.

This subpart prescribes (a) planning for all negotiated procurements as required by § 34-3.5001 below and (b) contents of the procurement plan. The procurement plan is an administrative tool designed to enable the contracting officer and the project officer to plan effectively for the accomplishment of procurements during a specified time frame. The procurement plan serves as an outline of the method by which the contracting officer expects to accomplish the procurement task.

§ 34-3.5001 Requirement for procurement planning.

(a) The procurement plan is required for all new procurements which are expected to exceed $100,000, except the following:

(1) Procurements of architect-engineer services;

(2) Procurements of utility services where the services are available from only one source;

(3) Procurements made from or through other Government agencies.

(b) Procurement plans will be prepared for procurements which are two-step formally advertised procurements or set-asides over $100,000.

§ 34-3.5002 Responsibilities for procurement planning.

(a) *Planning by program and staff activities.* (1) Whenever execution of a program or project requires the acquisition of property or services by contract the program or project plan should delineate all elements to be acquired by contract. Such program or project plans include a plan and timeframe for completion action. (See § 34-1.452-2.)

(2) Planning for procurement action should commence as early as possible in the fiscal year. Program offices which expect to initiate procurements are required to meet at the beginning of each fiscal year with the procurement officials who will be responsible for these procurements in order to discuss current staff capabilities and anticipated requirements in an effort to achieve an even distribution of workload over the fiscal year consistent with program needs. These meetings should result in understandings as to expected timing of project development and procurement requests.

(3) For each project, as soon as it appears likely there will be a procurement, the program office will notify the appropriate procurement office of the anticipated procurement. When notified, the procurement office will arrange to meet with the program staff in order to develop a plan for procurement.

(b) *Planning by procurement activities.* Procurement activities will coordinate with program and staff offices in order to ensure:

(1) Timely and comprehensive planning for procurement;

(2) Timely initiation of procurement requests or requests for contracts; and,

(3) Instruction of program and staff offices in proper procurement practices and methods.

§ 34-3.5003 Preparation and contents of procurement plan.

(a) The procurement plan (1) serves as an advance agreement between program and contracting personnel outlining the methods of how and when the procurement is to be accomplished; (2) serves to resolve problems early in the procurement cycle thereby precluding delay in contract placement; and (3) is developed prior to the preparation and submission by the program office of the formal procurement request and request for contract to the contracting office.

(b) Procurement plans shall be prepared and signed jointly by the cognizant contract negotiator and project officer and concurred in by the contracting officer. The scope of the procurement plan is determined by the characteristics of the procurement. Generally a joint planning meeting between the project officer and contract negotiator is held for the purpose of identifying and selecting those actions (technical and business) necessary to effect timely and proper placement of the contract. The project officer defines the requirement and describes the purpose of the project. Based on these needs, consideration shall be given to such matters as (1) refinement of work statements, scopes of work, specifications, etc., for solicitation purposes; (2) funding; (3) sources for solicitation and synopsizing requirements; (4) proposal evaluation criteria; (5) special program approvals and clearances including determination and findings; and (6) procurement planning schedule.

Subpart 34-3.51—Selection of Offerors for Negotiation and Award

§ 34-3.5100 Scope of subpart.

This section provides guidance to all ED personnel regarding (a) evaluation of the technical and other aspects of proposals and (b) the requirement for "written or oral discussion" with concerns whose proposals are "within a

competitive range," under competitive negotiated procurements.

§ 34-3.5101 Applicability.

This section is applicable to all competitive negotiated procurements conducted by ED under the authority of the Federal Procurement Regulations (FPR). Those portions of this section concerning written or oral discussions need not be applied: (a) To procurements in implementation of authorized set-aside programs; (b) to procurements where the existence of adequate competition or accurate prior cost experience with the item being procured clearly demonstrates that acceptance of an initial proposal without discussions would result in fair and reasonable prices, provided the request for proposals notifies all offerors of the possibility that award may be made without discussion and provided award is in fact made without any written or oral discussions.

§ 34-3.5102 Requests for proposals.

(a) Careful drafting of the request for proposals (RFP) is vital to the proper working of the competitive process. Particular efforts must be made to develop an accurate statement of work in order to preclude ambiguities and to avoid misunderstandings which might otherwise surface at later stages of the procurement.

(b) Unless otherwise authorized by the procedures of the operating agency, the RFP shall require that a proposal generally will be in two parts: A "Technical Proposal" and a "Business Proposal." Each of the parts shall be separate and complete in itself so that evaluation of one may be accomplished independently of evaluation of the other. Generally, the RFP will provide that the "Technical Proposal" not contain any reference to cost. Resource information, such as data concerning labor hours and categories, materials, subcontracts, travel, computer time, etc., shall be included in the "Technical Proposal" so that offeror's understanding of the scope of work may be evaluated.

(c) The instructions to the offerors concerning the "Business Proposal" should require submission of cost information in sufficient detail to allow a complete cost analysis. (See § 1-3.807-3 of this title for requirements for cost or pricing data.) Categories and amounts of labor, materials, travel, computer time, as well as information with regard to contractor past performance, including contracts or subcontracts for like services or supplies, financial capacity, certifications, and representations, and other pertinent administrative and business information should also be requested.

(d) Evaluation criteria must be developed by technical personnel, at the time of initiation of the procurement request, for inclusion by the contracting officer in the RFP. These criteria and their relative importance or weight require the exercise of judgment on a case-by-case basis, since the criteria must be tailored to the requirements of each particular procurement. These criteria must be submitted to the contracting officer in sufficient time to allow for this review before the issuance of the request for proposal. Since these criteria will serve as the standard against which all proposals will be evaluated, it is imperative that they be chosen carefully to emphasize those factors considered to be critical to the selection of a contractor.

(e) The RFP must inform offerors of all evaluation criteria and of the relative importance or weight attached to each criterion, although there need not be stated a numerical weighting formula. Evaluation criteria shall be described fully enough in each RFP to inform prospective offerors of the significant matters which should be addressed in the proposals. The technical and business proposal instructions of the RFP must inform the offeror of all information deemed essential to proper evaluation of the proposal, so that all competitors are aware of all requirements and so that the difference(s) in proposals will reflect the offeror's differing responses to unambiguous RFP requirements and criteria.

(f) No factors other than those set forth in the request for proposals as the evaluation criteria shall be used in the evaluation of technical proposals.

(g) The RFP evaluation criteria shall not be modified except by a formal amendment to the RFP.

§ 34-3.5103 Evaluation of technical proposals.

(a) The technical proposals received by the contracting officer will be forwarded to the technical evaluators for evaluation; the business portion of the proposal will be retained by the contracting officer for evaluation.

(b) The technical evaluators will evaluate each proposal in strict conformity with the evaluation criteria of the RFP and will assign each proposal a score. A technical ranking will then be compiled. The technical evaluators shall then identify each proposal as either acceptable or unacceptable. Predetermined cutoff scores shall not be employed.

(c) The technical evaluators shall then determine whether any proposal which has been rated as unacceptable might be considered acceptable upon the furnishing of clarifying data by the offeror, and the contracting officer will be so informed. The contracting officer will arrange for the submission of clarifying data in writing or by consultation, and furnish it to the technical evaluators for their consideration.

(d) It is essential to the competitive procurement process that all information contained in offerors' proposals be maintained in strict confidence. In no event during the evaluation period shall any offeror be told the number of proposals received, prices, cost ranges, or the Government cost estimate. Discussions with offerors relative to any aspect of the procurement shall be held only with the contracting officer or his authorized representative.

(e) For the sole purpose of eliminating any uncertainty or ambiguity in an initial proposal, the contracting officer may make inquiry of an offeror. Such inquiry of and clarification furnished by such offeror shall not be considered to constitute "discussions" within the meaning of § 1-3.805-1(g) of this title and shall not necessitate any inquiry of other offerors. However, if the clarification results in an offeror revising its proposal or it would in any way prejudice the interests of other offerors, discussions must be held with all responsible offerors within the competitive range.

§ 34-3.5104 Technical evaluation report.

A technical evaluation report shall be prepared and signed by the technical evaluators, furnished the contracting officer, and maintained as a permanent record in the contract file. The report shall reflect the ranking of the proposals and shall identify each proposal as acceptable or unacceptable in accordance with § 34-3.5103(b) and (c). The report shall also include a narrative evaluation specifying the strengths and weaknesses of each proposal, and any reservations or qualifications that might bear upon the selection of sources for negotiation and award. Concrete technical reasons supporting a determination of unacceptability with regard to any proposal shall be included.

§ 34-3.5105 Evaluation of business proposals.

(a) Each business proposal requires some form of price or cost analysis. The contracting officer must exercise judgment in determining the extent of analysis in each case. In high-dollar value procurements, the analysis should be thorough and the record carefully documented to disclose the extent to which the various elements of costs, fixed fee, or profit contained in the contractor's proposals were analyzed. The negotiation memorandum should also reflect the consideration given to the recommendations, if any, of the price analyst and the basis for nonacceptance or departure from the recommendations during the course of negotiations.

(b) The contracting officer must appraise the management capability of the offeror to perform the required work in a timely manner. In making this appraisal, the contracting officer must consider such factors as the company's management organization, past performance, reputation for reliability, and availability of the required facilities, and cost controls.

§ 34-3.5106 Conduct of evaluation.

Personnel participating in any way in evaluating proposals shall not reveal any information concerning the evaluations underway except to an individual participating in the same evaluation proceedings, and then only to the extent that such information is required in connection with such proceedings. Divulging information during the evaluation, selection, and negotiation phases of the procurement to personnel not having a need to know could jeopardize any resultant award. The Contracting Officer will therefore instruct personnel participating in the evaluations to observe these restrictions and assure that personnel understand that unauthorized disclosure of information, no matter how innocent, could subject such personnel to disciplinary action.

§ 34-3.5107 Competitive range.

Unless an award is made without any discussions in accordance with § 34-3.5101, discussions shall be conducted with each offeror in the "competitive range." The competitive range is composed of those offerors with which there is a possibility of conducting meaningful discussions which could result in the improvement of their offers, price and other factors considered. Determining which proposals fall within a competitive range will depend upon the particular circumstances of each negotiation. Cost or price alone is sometimes controlling, but technical capability and other relevant criteria may be paramount. The decision as to which firms are and which firms are not within a competitive range is a matter of administrative discretion. There could conceivably be a business proposal in which the cost or price is so high that it seems to be completely out of the competitive range. However, before making such a determination the contracting officer should consult with the technical personnel to determine possible reasons for the apparently excessive price. In determining the competitive range, the contracting officer should consider the following:

(a) A proposal must be considered to be within the competitive range unless it is either so inferior technically or so high in cost as to preclude any possibility of meaningful negotiation with the offeror, or unless the offeror does not have a reasonable chance of being selected for the final award.

(b) The competitive range should be decided on the basis of the array of scores or relative ranking of the offerors, not on a predetermined absolute score or cut-off level of acceptability. Borderline proposals must not be excluded from consideration automatically if they are reasonably susceptible of being made acceptable by clarification or discussions.

(c) No offeror who is in the competitive range shall be eliminated from the competitive range solely because of an offer to deliver services or supplies of a higher quality than required. If there is no substantial basis for distinguishing between the technical excellence of proposal(s) meeting the Government's requirements, price or best buy analysis should then become the controlling factor.

§ 34-3.5108 Conduct of discussions.

(a) The contracting officer, in cooperation with technical personnel, must conduct written or oral discussions (negotiations) of the work to be performed, the cost of the work, and other relevant topics with all those offerors within the competitive range. The contracting officer shall point out to each offeror the ambiguities, uncertainties, and deficiencies, if any, in its proposal. The contracting officer shall then give each offeror a reasonable opportunity to support, clarify, correct, improve or revise its proposal. Discussions with one offeror shall neither identify areas in which another has apparently achieved a higher evaluation) or provided more detail (nor transmit information) which could give one offeror a competitive advantage over another. Cost estimates made by the Government will not be disclosed.

(b) Careful judgment will be exercised in determining the extent of discussions. In some cases more than one round of discussions with all the offerors within the competitive range may be required. The time available, the expense and administrative limita-

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tions, and the size and significance of the procurement should all be considered in deciding on the type, duration, and depth of the discussions.

§ 34-3.5109 Closing of negotiations.

In order to properly terminate negotiations, the contracting officer shall advise each offeror within the competitive range that (a) negotiations are being conducted, (b) offerors are being asked for "best and final offer," not merely to confirm or reconfirm prior offers, and (c) any revision or modification of proposals must be submitted by the cutoff date.

§ 34-3.5110 Selection of contractor.

(a) After the close of discussions and the receipt of any addenda to proposals, the contracting officer shall select for award the offeror(s) whose proposal(s) offers the greatest advantage to the Government, price and other factors considered.

(b) Research and development contracts should be awarded to those organizations, including educational institutions, which have the highest competence in the specific field of science or technology involved. However, awards should not be made for research and development capabilities that exceed those needed for the successful performance of the particular project.

(c) Whenever the contract is to have a fixed price, price may not be disregarded in selecting a contractor. This is particularly true where more than one acceptable offer from technically qualified sources remains for consideration after conduct of negotiations. If a lower-priced, lower-scored offer meets the Government's needs, acceptance of a higher-priced, higher-scored offer shall be supported by a specific determination by the contracting officer that the technical superiority of the higher-priced offer warrants the additional cost involved in the award of a contract to that offeror.

§ 34-3.5111 Notice and debriefing.

Promptly after award of the contract, notice of unsuccessful offerors will be given in accordance with EDPR 34-3.103.

Subpart 34-3.52—Administrative Actions in Connection With Cost Overruns

§ 34-3.5200 Scope of subpart.

This subpart sets forth the procedure to be followed when a cost overrun is anticipated, i.e., the allowable actual cost of performing a cost reimbursement type contract is expected to exceed the total estimated cost specified in the contract.

§ 34-3.5201 Applicability.

(a) This subpart applies to the administration of cost reimbursement type contracts and the cost reimbursement portion of other types of contracts.

(b) Nothing in this subpart shall be construed to relieve Contractors from compliance with the Limitation of Cost clause or any other provisions of such contracts.

§ 34-3.5202 General.

Reimbursement for costs incurred under contracts referred to in § 34-3.5201 shall not exceed the amount of funds obligated by the contract, unless increased by the contracting officer. Cost overruns shall be held to an absolute minimum compatible with accomplishment of the statement of work.

§ 34-3.5203 Contract administration.

§ 34-3.5203-1 General.

Upon receipt of information that a contractor's accumulated cost and projected expenditures will exceed the limit of funds obligated by the contract, the contracting officer shall coordinate immediately with the appropriate program office to determine whether the contract should be modified or terminated. If the contracting officer receives information from a source other than the contractor that a cost overrun is anticipated, the contracting officer shall verify the information with the contractor and remind the contractor immediately of the notification requirements of the Limitation of Cost clause.

§ 34-3.5203-2 Procedure.

(a) Upon notification that a cost overrun is anticipated, the contracting officer shall request the contractor to submit a request for additional funds including:

(1) Name and location of contractor.

(2) Contract number and expiration date.

(3) Contract item(s) and amount(s) of each creating the overrun.

(4) The elements of cost which changed from the original estimate, i.e., labor, material, travel, overhead, etc. This data should be furnished in the following format:

(i) Original estimate,

(ii) Costs incurred to date,

(iii) Estimated cost to completion,

(iv) Revised estimate,

(v) Amount of adjustment.

(5) The factors responsible for the increase, i.e., error in estimate, changed conditions, etc.

(6) The latest date by which funds must be available for commitment to avoid contract slippage, work stoppage, or other program impairment.

(b) When the contractor submits notice of an impending overrun the contracting officer shall:

(1) Immediately advise the appropriate program office and furnish a copy of the notice and any other data received.

(2) Request audit or cost advisory services and technical support, as necessary, for evaluation of information and data received.

(3) Maintain continuous follow-up with the program office in order to obtain a timely decision as to whether the work under the contract will be continued and additional funds provided, or the contract terminated. The decision of the program office must be supported by an appropriate written statement and funding authority or a formal request for termination, when applicable. After a programming and funding decision is received from the program office the contracting officer shall promptly notify the contractor in writing that: (i) A specified amount of additional funds has been allotted to the contract by a contractual instrument; or (ii) work will be discontinued when the funds allotted to the contract have been exhausted and that any work performed after that date is at the contractor's risk; or (iii) the Government is considering whether additional funds should be allotted to the contract and will notify the contractor as soon as possible, but that any work performed after the funds then allocated to the contract have been exhausted is at the contractor's risk. Timely, formal notification of the Government's intention is essential in order to preclude loss of contractual rights in the event of dispute, termination, or litigation.

(c) If program requirements permit, contracting officers should refrain from issuing any contractual documents which will require new work or an extension of time, pending resolution of an overrun or additional fund request.

§ 34-3.5203-3 Contract modifications.

(a) Modifications (to contracts containing the Limitation of Cost clause) shall include either (1) A provision increasing the estimated or ceiling amount referred to in the Limitation of Cost clause of the contract and stating that the clause will thereafter apply in respect to such increased amount; or

(2) A provision stating that the estimated or ceiling amount referred to in the contract is not changed by the modification and that the Limitation of Cost clause will continue to apply with respect to the amount in effect prior to the modification.

(b) The fixed fee provided in a contract shall not be changed when funding a cost overrun. Changes in fixed fee will be made only to reflect changes in the scope of work which justify an increase or decrease in fee.

PART 34-4—SPECIAL TYPES AND METHODS OF PROCUREMENT

Subpart 34-4.51—Paid Advertising

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Subpart 34-4.52—Unsolicited Proposals

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34–4.5600 Scope of subpart.
34–4.5601 Changes in research methods, procedures, objectives or phenomena under study.
34–4.5602 Change or absence of the principal investigator or project leader.
34–4.5603 Subcontracting or transferring the research effort.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 45 FR 49055, July 22, 1980, unless otherwise noted.

Subpart 34–4.51—Paid Advertising

§ 34–4.5100 Scope of subpart.

This subpart provides policies and procedures for the procurement of paid advertising as covered by Title 5, U.S.C. 302, Title 44, U.S.C. 321, 322, and 324, and Title 7, Chapter 5, section 25.2, General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies.

§ 34–4.5101 Policies and procedures.

(a) The Assistant Secretary for Management or such other person as the Secretary may designate may publish advertisements, notices, and contract proposals in newspapers and periodicals in accordance with the requirements and conditions referenced in § 34–4.5100. Authority to purchase paid advertising must be granted in writing by the Assistant Secretary for Management or such other person as the Secretary may designate. No advertisement, notice of proposal will be published prior to receipt of advanced written authority for such publication. No voucher for any such advertisement or publication will be paid unless there is presented, with the voucher, a copy of such written authority.

(b) Requests for procurement of advertising shall be accompanied by written authority to advertise or publish which sets forth justification and includes the names of newspapers or journals concerned, frequency and dates of proposed advertisements, estimated cost, and other pertinent information.

(c) Paid advertisements shall be limited to publication of essential details of invitations for bids and requests for proposals including those for the sale of personal property, and for the recruitment of employees.

(d) Standard form 1143, Advertising Order, shall be used for procurement and payment of paid advertising. Procedures for payment of vouchers are contained in Title 7, Chapter 5, section 25.2, General Accounting Office Manual for Guidance of Federal Agencies.

Subpart 34–4.52—Unsolicited Proposals

§ 34–4.5200 Scope of subpart.

This subpart provides policies and procedures applicable to the handling of documents submitted as unsolicited proposals.

§ 34–4.5201 Definition.

An "unsolicited proposal" is a written offer to perform research and development work (including feasibility studies and demonstrations) submitted to the Government by an organization or individual solely on its own initiative and without prior formal or informal solicitation. Unsolicited proposals purport to represent original effort by the offeror, in the form of new and unique ideas, and are offered in the hope that the Government will support the offeror in the further pursuit of the research and development activities proposed therein.

§ 34-4.5202 Policy.

§ 34-4.5202-1 General.

(a) It is the policy of ED that the public be informed of technological and scientific (including the behavioral and social sciences) areas encompassed by the Department's mission, and to encourage organizations and individuals to originate valuable ideas relevant to the furtherance thereof and to submit such ideas in unsolicited proposals.

(b) All unsolicited proposals should be specific and, as a minimum, include the information set forth below. Although it is desired that unsolicited proposals be prepared in conformance with the standards set forth below, agencies may accept unsolicited proposals for evaluation purposes which do not conform thereto:

(1) Name and address of the organization or individual submitting the proposal;

(2) Date of preparation or submission;

(3) Type of organization (profit, nonprofit, educational, other);

(4) Concise title and clear and concise abstract. Extensive material should be included only in appendices;

(5) An outline and discussion of the purpose of the proposed effort or activity, the method of attack upon the problem, and the nature and extent of the anticipated results;

(6) Names of the key personnel to be involved (name of principal investigator, if applicable), brief biographical information, including principal publications and relevant experience;

(7) Proposed starting and completion dates;

(8) Equipment, facility, and personnel requirements;

(9) Proposed budget, including separate cost estimates for salaries and wages, equipment, expendable supplies, services, travel, subcontracts, other direct costs and overhead;

(10) Names of any other Federal agencies receiving the unsolicited proposal and/or funding the proposed effort or activity;

(11) Brief description of the offeror's facilities, particularly those which would be used in the proposed effort or activity;

(12) Brief outline of the offeror's previous work and experience in the field;

(13) A current financial statement and, if available, a descriptive brochure;

(14) Period for which unsolicited proposal is valid;

(15) Names and telephone numbers of offeror's primary business and technical personnel whom the agency may contact during evaluation and/or negotiation;

(16) Identification, on the cover sheet, of technical data which the offeror intends to be used by ED for evaluation purposes only (see § 34-1.353(c) of the EDPR); and

(17) Signature of a responsible official of the proposing organization or a person authorized to contractually obligate such organization.

(c) Unsolicited proposals should be submitted well in advance of the desired beginning of support, and in ample copies (five copies as a minimum) to allow simultaneous study by all reviewers.

(d) All unsolicited proposals shall be acknowledged as soon after receipt as possible and should be processed in an expeditious manner.

§ 34-4.5202-2 Treatment of technical data in unsolicited proposals.

The treatment of technical data contained in unsolicited proposals and the legends to be used are contained in § 34-1.353 of the EDPR.

§ 34-4.5202-3 Method of procurement.

(a) It is ED's policy to obtain competition whenever possible (see § 1-1.301-1). However, if a decision is made to award a contract to an offeror on the basis of an unsolicited proposal, the procurement will be conducted without competition.

(b) Subject to the provisions of § 34-4.5203-3(a), a document which qualifies as an unsolicited proposal may not serve as the basis for a competitive solicitation of proposals. Therefore, a determination must be made as to whether a document qualifies as an unsolicited proposal during the preliminary review of the document in accordance with § 34-4.5203-1.

§ 34-4.5202-4 Grant applications.

(a) Research and development work is supported by ED through grants as well as contracts.

(b) Procurement officials shall not refuse to consider any unsolicited proposal merely because it was initially submitted as a grant application. However, contracts shall not be awarded on the basis of unsolicited proposals which have been rejected for grant support on the ground that they lack scientific merit.

§ 34-4.5203 Procedure.

§ 34-4.5203-1 Preliminary review.

(a) A preliminary review of each document submitted as an unsolicited proposal shall be conducted by program personnel to determine that it:

(1) Contains sufficient technical and cost information to enable meaningful evaluation;

(2) Has been approved by a responsible official of the proposing organization or a person authorized to contractually obligate such organizations; and

(3) Does not merely offer to perform standard services, such as routine analyses or testing in accordance with established procedures, or to provide "off-the-shelf" articles.

(b) In addition, the reviewing program official shall make a written determination as to whether the document is truly unsolicited. In making such determination, consideration shall be given to all relevant circumstances, including whether the document may have resulted from: (1) The close professional relationships that frequently develop between program representatives and their counterparts in the community; or (2) the inadvertent disclosure by program personnel of information relating to specific projects being contemplated by ED.

(c) If the document does not meet the requirements of paragraph (a) of this section, or is determined not to be truly unsolicited, a comprehensive evaluation need not be made, and the document may be considered and handled as correspondence or advertising. In such cases a prompt reply shall be sent to the offeror indicating how the document is being interpreted and the reason(s) for not considering it an unsolicited proposal.

(d) When a document, based upon preliminary review, qualifies as an unsolicited proposal, it shall be circulated for comprehensive evaluation in accordance with § 34-4.5203-2, and a copy thereof, together with the reviewing official's written determination, shall be furnished to the Assistant Secretary for Management or such other person as the Secretary may designate.

§ 34-4.5203-2 Comprehensive evaluation.

(a) Every unsolicited proposal that is circulated for comprehensive evaluation shall have attached or imprinted a legend identifying it as an unsolicited proposal, and stating that it may be used only for purposes of evaluation. See § 34-1.353 (c) and (e) of the EDPR.

(b) In evaluating an unsolicited proposal, the evaluating office(s) shall consider, in addition to any other criteria, the following factors:

(1) The overall scientific and technical merit of the proposed effort;

(2) The potential contribution which the proposed effort is expected to make to specific program objective(s), if supported at this time;

(3) The unique capabilities, related experience, facilities, instrumentation, or techniques which the offeror possesses and offers, and which are considered to be integral factors for achieving the scientific, technical, or technological objective(s) of the proposal;

(4) The unique qualifications, capabilities, and experience of the proposed principal investigator and/or key personnel.

(c) If an unsolicited proposal is not to be accepted, the offeror shall be informed by a suitable letter. A copy of such letter and associated unsolicited proposal shall be retained in the files of the contracting officer.

§ 34-4.5203-3 Procurement procedure.

(a) *Competitive procurement.* (1) When a document qualifies as an unsolicited proposal, but its substance is available to ED without restriction from another source, or its substance closely resembles that of a pending

competitive solicitation or otherwise is not sufficiently unique to justify acceptance, ED's policy of obtaining competition applies (see § 34-4.5202-3).

(2) When procurement is intended and competition is feasible, the unsolicited proposal shall be rejected, as in § 34-4.5203-2. All readily available copies (excluding the contracting officer's official file copy) shall be returned to the offeror.

(b) *Noncompetitive procurement.* (1) A favorable technical evaluation of an unsolicited proposal is not, in itself, sufficient justification for negotiating on a noncompetitive basis with the offeror. When an unsolicited proposal has received a favorable technical evaluation and it is determined that the substance thereof is not available to ED without restriction from another source, or competition is otherwise precluded, the subject matter of such unsolicited proposal may be procured from the offeror on a noncompetitive basis. The program office sponsoring the procurement shall support its recommendation with a "Justification for Acceptance of Unsolicited Proposals." The "Justification" shall include the findings set forth in paragraphs (b)(1) (i) or (ii) of this section:

(i) The procurement is for basic scientific or engineering research; and the unsolicited proposal was selected on the basis of its overall merit, cost and contribution to ED's program objectives, after a thorough evaluation and comparison with other proposals, solicited or unsolicited, in the same or related fields; or

(ii) The procurement is for services other than basic research (e.g., development, feasibility studies, etc.); the unsolicited proposal contains technical data or offers unique capabilities that are not available from another source; and it is not feasible or practical to define the Government's requirement in such a way as to avoid the necessity of using the technical data contained in the unsolicited proposal.

(2) In addition, the "Justification" shall include the facts and circumstances that support the recommendation action. The following illustrations represent factors which should be considered, as appropriate, in preparing the "Justification."

(i) The scientific/technical merits of the unsolicited proposal and its potential contribution to the agency's program objectives;

(ii) The qualifications, capabilities, and related experience of the offeror, principal investigator, and/or key personnel;

(iii) Unique facilities, instrumentation, or techniques; and

(iv) Circumstances that operate to preclude competitive negotiation.

(3) The "Justification for Acceptance of Unsolicited Proposal" shall be submitted to the contracting officer together with, but as a separate document from, the request for contract, and shall be signed by the same official of the cognizant program office who signs the request for contract. Approval of the "Justification" shall be made at the same level as prescribed in § 34-3.802-50(d) for approval of "Justifications for Noncompetitive Procurements."

(c) *Negotiation.* Formal RFP's or RFQ's shall not be issued to obtain additional information required for the negotiation of contracts based on unsolicited proposals. The unsolicited proposal itself constitutes the basis for negotiation and any further technical or budgetary information requested or received shall be considered to supplement, amend or revise the original accepted unsolicited proposal.

Subpart 34-4.54—Procurement Clearance of Audiovisual Materials and Contracts for Public Affairs Services

§ 34-4.5400 Scope of subpart.

This subpart provides for prior clearances and methods of contracting for the procurement of audiovisual materials and/or contracts for public affairs services in excess of $5,000. Chapter 1-121 of the General Administration Manual sets forth supplementary requirements for review of audiovisual materials intended for use with the public contracts for public affairs services. The term "audiovisual materials," as used in this subpart, refers not only to the completed product but also to all steps and techniques leading to the realization of the completed product.

The term includes motion pictures, video tapes, slide shows, film strips, audio recordings, exhibitry, or similar materials; design, layout, preparation of scripts, filming or taping, sound recording, editing, fabrication, or other activities leading to the acquisition or creation of audiovisual materials regardless of intended use.

§ 34-4.5401 Responsibility.

No procurement action for acquisition of audiovisual materials or the contracting for public affairs services shall be initiated without first obtaining proper clearances and approvals set forth below. The Office of the Assistant Secretary for Public Affairs (ASPA) has been designated as the office of primary responsibility for review and approval of all audiovisual materials and contracts for public affairs services. Requests for the procurement of audiovisual materials and contracts for public affairs services shall be submitted to ASPA for review and approval (or disapproval).

§ 34-4.5402 Clearance for procurement.

(a) Clearances shall apply to contracts dealing, in whole or in part, with development of audiovisual materials whether for public information, education or training purposes and to contracts for public affairs services.

(b) Requests for audiovisual material or public affairs services contracts will be submitted to ASPA for review and approval prior to initiating any procurement action.

(c) Each request shall include the name of the assigned project officer. Failure to assign a project officer whose experience in audiovisual materials or public affairs services is suitable to the project will constitute sufficient reason for disapproval of the project.

(d) The approved original of the request shall be made a part of the permanent procurement file.

§ 34-4.5403 Methods of contracting.

(a) All procurements shall be conducted on a competitive basis whenever possible. The requirement for publicizing proposed procurements by synopsis in the Commerce Business Daily, as set forth in § 1-1.1003, Federal Procurement Regulations, shall be followed.

(b) When considered desirable and appropriate to do so, current approved bidders lists, call contracts, or procurement arrangements of another Federal agency or department may be used subject to prior concurrence of ASPA.

§ 34-4.5404 Competition.

(a) Contracts shall be awarded after competition and on a fixed price basis whenever feasible. Requests for sole source procurement shall be processed in accordance with § 34-3.802-50, however, ASPA shall concur in the request prior to processing the "Justification."

(b) When call contracts or procurement arrangements have already been synopsized, no further synopsis is necessary when issuing calls against the basic contract. However, this procedure does not eliminate the requirement to obtain adequate competition from sources described in § 34-4.5403(b) consistent with the nature and size of the requirement.

Subpart 34-4.56—Research Contracts With Educational Institutions of the United States

§ 34-4.5600 Scope of subpart.

This subpart sets forth the Department's policy on review and direction of research contracts with educational institutions in the United States, and implements Part I, Attachment A, OMB Circular No. A-101, establishing Government policy on review and direction of the research effort under research projects.

§ 34-4.5601 Changes in research methods, procedures, objectives or phenomena under study.

(a) Review and direction requirements for research contracts with educational institutions should, whenever possible, permit the principal investigator to change the methods and procedures for conducting the research without obtaining prior Government approval. Significant changes in the methods or procedures utilized by the contractor shall be reported in subsequent technical reports.

(b) In the event the methodology or experiment is stated as a specific objective of the contract, such stated objectives shall not be changed by the contractor without obtaining prior approval from the contracting officer.

(c) The phenomenon or phenomena under study, i.e., the broad category of research, shall not be changed by the contractor without obtaining prior approval of the contracting officer.

(d) The degree of review or direction exercised may vary from contract to contract depending upon the amount of detail used in stating the objectives of the research effort. If the review or direction requirements are to differ from those specified in paragraphs (a), (b), and (c) of this section, the contract should clearly specify such additional or different requirements as necessary.

§ 34-4.5602 Change or absence of the principal investigator or project leader.

(a) The decision as to whether the Department is interested in a proposed research contract is based, to a considerable extent, upon its evaluation of the proposed contractor's principal investigator or project leader's knowledge of the field and capabilities to manage the contract in an efficient and productive manner. Therefore, the Department desires that the named principal investigator or project leader be continuously responsible for the conduct of the contract and be closely involved with the research efforts.

(b) Written prior approval of the contracting officer is required by the contractor to change the contractor's principal investigator or project leader or to continue work under the contract without participation of the principal investigator or project leader for a period in excess of 3 continuous months. Any substantial reduction in the effort devoted to the contract work by the contractor's principal investigator or project leader also requires the prior written approval of the contracting officer. If the contracting officer determines that the reduction of effort would be so substantial as to impair the successful prosecution of the contract, the contracting officer may request a change of principal investigator or project leader suitable to the Department, or terminate or appropriately modify the contract.

(c) The provisions of paragraph (b) of this section also apply when the contract identifies coprincipal investigators or project leaders or otherwise includes and identifies additional contractor personnel considered essential to the conduct of the proposed research contract.

§ 34-4.5603 Subcontracting or transferring the research effort.

The Department's decision to enter into a research contract with an educational institution is based in part upon its evaluation of the principal investigator(s) or project leader(s) as well as the support available to the contract from the institution, such as facilities and administrative assistance. During the negotiation of the contract, the contracting officer (contract negotiator) shall to the extent possible, obtain complete information concerning the contractor's plans for subcontracting any portion of the research effort. None of the research effort shall be subcontracted or transferred to another organization without having been specifically set forth in the contract, or without the prior approval of the contracting officer. This does not preclude the purchase of supplies, materials, equipment or general support services. None of the foregoing shall be construed to authorize transfer of a research contract or any interest therein, where prohibited by law.

PART 34-8—TERMINATION OF CONTRACTS

Subpart 34-8.6—Termination for Default

§ 34-8.601 General.

Prior to the issuance of any notice of termination for default, the cognizant contracting officer shall seek the advice of the Office of General Counsel concerning the proposed termination.

(5 U.S.C. 301; 40 U.S.C. 486(c))

[45 FR 49058, July 22, 1980]

PART 34-12—LABOR

Subpart 34-12.6—Walsh-Healey Public Contracts Act

Sec.
34-12.604 Responsibilities of contracting officers.
34-12.604-50 Determinations of eligibility of bidders and offerors.

Subpart 34-12.6—Walsh-Healey Public Contracts Act

§ 34-12.604 Responsibilities of contracting officers.

(5 U.S.C. 301; 40 U.S.C. 486(c))

[45 FR 49058, July 22, 1980]

§ 34-12.604-50 Determinations of eligibility of bidders and offerors.

(a) *Initial determination of eligibility.* The responsibility for applying the eligibility requirements set forth in § 1-12.601 of this title rests with the contracting officer. The Department of Labor does not conduct pre-award investigations, nor render final determinations of eligibility until the contracting officer has gathered all the necessary evidence and initially determined whether the eligibility requirements have been met. When a contracting officer has determined that an apparently successful bidder or offeror is ineligible, the contracting officer shall notify the bidder or offeror promptly in writing and inform it:

(1) That it does not meet the eligibility requirements and provide the reason(s) for ineligibility;

(2) That it may protest the determination and submit evidence of eligibility to the contracting officer; and

(3) That if after review of the evidence submitted, the contracting officer still deems the bidder or offeror ineligible, the contracting officer will forward the protest, together with pertinent material to the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210 for a final determination.

(b) *Protests by other bidders or offerors*—(1) *Before award.* (i) When another bidder or offeror challenges the eligibility of the apparently successful bidder or offeror prior to award the contracting officer shall:

(A) Notify the protestant in writing that it may submit written evidence concerning the alleged ineligibility of the apparently successful bidder or offeror.

(B) Provide the apparently successful bidder or offeror with the written allegations of the protestant and inform it that it may submit evidence supporting its eligibility.

(C) Notify both the protestant and the apparently successful bidder or offeror that after reviewing all evidence submitted, the contracting officer shall make a decision and if that decision is adverse to the protestant, the protest together with all pertinent material will be forwarded to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210 for a final determination.

(D) Other bidders or offerors whose bids or offers might become eligible for award shall be notified when award is being withheld pending the disposition of a protest. Such bidders or offerors shall be requested to extend the acceptance period of their bids or offers.

(ii) Where a protest against award has been lodged no award shall be made unless the contracting officer determines that:

(A) The items to be procured are urgently required; or

(B) Delivery or performance will be unduly delayed by failure to make award promptly; or

(C) A prompt award will otherwise be advantageous to the Government. If award under paragraph (b)(1)(ii)(A), (B), or (C) of this section is contemplated, the contracting officer shall obtain the approval of the Assistant Secretary for Management or such other person as the Secretary may designate before proceeding with the award; the file shall be documented to explain the need for making an award prior to the receipt of a determination from the Department of Labor; and written notice of the decision to proceed shall be given to the Administrator, Wage and Hour Division, U.S. Department of Labor, the protestant, and to others concerned when appropriate.

(2) *After award.* A protest received after award shall be forwarded to the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210, if the contract has not been completed. The protestant shall be notified of the submission to the Department of Labor. If the contract has been completed, the protestant shall be notified that no action shall be taken on the protest.

(5 U.S.C. 301; 40 U.S.C. 486(c))

[45 FR 49058, July 22, 1980]

PART 34-30—CONTRACT FINANCING

Sec.

34-30.000 Scope of part.

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34-30.403 Interest.
34-30.408 Uses of advance payments.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 45 FR 49059, July 22, 1980, unless otherwise noted.

§ 34-30.000 Scope of part.

This part contains general Departmental contract financing policies and procedures applicable to the financing of all types of contracts.

Subpart 34-30.4—Advance Payments

§ 34-30.403 Interest.

(a) Interest will be charged on the unliquidated balance of all advance payments at a rate of 6 percent per annum except that advance payments without interest may be approved when in connection with nonprofit contracts which are without fee with educational institutions and other nonprofit organizations, whether public or private, for the performance of work involving educational programs, including, but not limited to, such programs as:

(1) Dissemination of information derived from education research;

(2) Surveys or demonstrations in the field of education;

(3) Producing or distributing educational media for handicapped persons including captioned films for the deaf;

(4) Operation of language or area centers;

(b) Contracts with interest-free advance payments should provide that the contractor will charge interest at a rate of 6 percent per annum on subadvances or downpayments to subcontractors, and that interest charged on such subadvances and downpayments will be credited to the account of the Government. However, interest should not be charged on subadvances on nonprofit subcontracts which are without fee with nonprofit educational or research institutions for experimental, research, or developmental work.

§ 34-30.408 Uses of advance payments.

(a) All contracts for research work with educational institutions located in the United States shall provide for financing by way of advance payments, in reasonable amounts, unless otherwise prohibited by law.

(b) The Treasury Department's letter of credit method of financing advance payments shall be employed, whenever feasible. Department-wide blanket letters of credit, which apply to the financing of all research contracts and grants between the institution and the Department, shall be utilized to the maximum extent practicable.

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PART 44–1—GENERAL

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AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); Reorganization Plan No. 3 of 1978, 43 FR 41943.

SOURCE: 45 FR 55346, Aug. 19, 1980, unless otherwise noted.

§ 44–1.000 Scope of part.

This part sets forth policies and procedures concerning: The Federal Emergency Management Agency Procurement Regulation System; definition of terms used throughout this chapter; general policies of procurement; small business concerns; labor surplus area concerns; publicizing procurement actions; and the use of contracts versus assistance documents.

Subpart 1.0—Regulation System

§ 44–1.001 Scope of subpart.

This subpart sets forth introductory information pertaining to the Federal Emergency Management Agency Procurement Regulation System; its purpose, authority, applicability, issuance, arrangement, implementation, supplementation and deviation procedure.

§ 44–1.002 Purpose.

This subpart establishes the Federal Emergency Management Agency Procurement Regulations (FEMAPR) for the codification and publication of uniform policies and procedures applicable to the Federal Emergency Management Agency (FEMA) in the procurement of personal property and nonpersonal services (including construction).

§ 44–1.003 Authority.

41 CFR 1–1.008 requires that as portions of Federal Procurement Regulation (FPR) material are prescribed, agencies shall publish in the FEDERAL REGISTER implementing regulations deemed necessary for business concerns, and others properly interested, to understand basic and significant agency procurement policies and procedures which implement, supplement, and deviate from the FPR. In compliance with this requirement, the FEMAPR are herein prescribed.

§ 44–1.004 Applicability.

The FEMAPR apply to all procurements within FEMA but do not apply to the placement or administration of cooperative agreements or grants.

§ 44–1.004–50 Relationship to the FPR.

Material published in the FEMAPR will not repeat, paraphrase or otherwise restate material in the FPR except to the extent necessary to implement, supplement or deviate therefrom.

§ 44–1.005 Exclusions.

Certain FEMA policies and procedures which come within the scope of the FEMAPR nevertheless may be excluded from the FEMAPR. These exclusions include the following categories:

(a) Policy or procedure for subject matter which bears a security classification.

(b) Policy or procedure which is expected to be effective for a period of six months or less.

(c) Policy or procedure which is being instituted on an experimental basis for a reasonable period.

(d) Policy or procedure of an internal nature which shall be issued as either a FEMA Handbook or Standard

Operating Procedure or a revision to either of the above.

§ 44-1.006 Issuance.

§ 44-1.006-1 Code arrangement.

The FEMAPR are issued in the Code of Federal Regulations as Chapter 44 of Title 41, Public Contracts and Property Management.

§ 44-1.006-2 Publication.

The FEMAPR, as deemed necessary by the Director, Office of Finance and Administration, for information to the general public, are published initially in the daily issue of the FEDERAL REGISTER and in final cumulated form in title 41 of the Code of Federal Regulations. The above regulations are printed in separate loose-leaf volume form for distribution to appropriate FEMA organizational elements.

§ 44-1.006-3 Copies.

Copies of the FEMAPR in FEDERAL REGISTER and Code of Federal Regulations form may be purchased at nominal cost from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. Upon request, copies of the FEMAPR loose-leaf volume and amendments and additions thereto will be distributed to agency procuring offices and other appropriate agency organizational units by the Policy and Support Branch Acquisition Management Division.

§ 44-1.006-4 Coordination.

In the development of FEMAPR issuances, the views of interested agency procuring offices, and, where appropriate and feasible, the views of interested business and professional organizations, will be considered.

§ 44-1.007 Arrangement.

§ 44-1.007-1 General plan.

The general plan, numbering system, and nomenclature used in the FEMAPR conform with those of the Federal Procurement Regulation (FPR) and FEDERAL REGISTER Standards approval for the FPR.

§ 44-1.007-2 Numbering and titling.

(a) Where the FEMAPR implements or deviates from a part, subpart, section or subsection of the FPR, the FEMAPR part, subpart, section or subsection will be numbered and titled to correspond to the part, subpart, section or subsection of the FPR.

(b) Where the subject matter contained in a part, subpart, section or subsection of the FPR requires no further implementation, the FEMAPR will contain no corresponding part, subpart, section or subsection number and the subject matter as published in the FPR governs.

(c) Material published in the FEMAPR which supplements the FPR will be assigned numbers from the number 50 onward to denote the new part, subpart, section or subsection being added. For example, § 44-50.100 (new part), § 44-1.5000 (new subpart), § 44-1.150 (new section), § 44-1.102-50 (new subsection).

§ 44-1.007-3 Citation.

FEMAPR will be cited in accordance with FEDERAL REGISTER Standards approved for the FPR. Thus this section, when referred to in divisions of the FEMAPR, should be cited as "§ 44-1.007-3" of this chapter. When this section is referred to formally in official documents, such as legal briefs, it should be cited as "41 CFR 44-1.007-3". Any section of the FEMAPR may be informally identified as "FEMAPR" followed by the section number, such as FEMAPR 44-1.007-3.

§ 44-1.009 Deviation.

§ 44-1.009-1 Description.

As used in the FEMAPR, the term "deviation" includes any of the actions set forth in 41 CFR 1-1.009-1 for either the FEMAPR or the FPR.

§ 44-1.009-2 Procedure.

In the interest of establishing and maintaining uniformity to the greatest extent feasible, deviations from the FPR and the FEMAPR shall be kept to a minimum and controlled as follows:

(a) Deviations in both individual cases and classes of cases must be au-

thorized in advance by the Director, Acquisition Management Division. Requests for such authorization shall:

(1) Cite the specific parts of the FPR or FEMAPR from which it is desired to deviate.

(2) Provide a full description of the deviation.

(3) Indicate the circumstances which will require use of the deviation.

(4) Give detailed reasons supporting the actions requested; and

(5) Give reasons why the action is in the best interest of the Government.

(b) Where the deviation applies to a class of cases, review and approval shall be accomplished in accordance with 41 CFR 1-1.009-2(c) for deviations to either the FPR or the FEMAPR.

(c) The contract file(s) of the requesting office shall include a copy of the request and the approval. Class deviations will be issued as a part of the FEMAPR, if they are of a continuing nature and publication is deemed appropriate by the Director, Office of Finance and Administration.

Subpart 1.2—Definition of Terms

§ 44-1.201 Definitions.

For the purposes of the FEMAPR, the following terms have the meaning set forth in this subpart unless otherwise indicated.

§ 44-1.202 Agency.

"Agency" means the Federal Emergency Management Agency or as it is referred to throughout the FEMAPR, "FEMA".

§ 44-1.204 Director.

"Director" means the Director of the Federal Emergency Management Agency. In the FPR, the term "Secretary", where it pertains to a procuring agency, shall be construed to mean "Director".

§ 44-1.205 Procuring office.

"Procuring offices" means those offices which have delegated or redelegated authority to purchase or contract for supplies, services and/or construction.

§ 44-1.206 Head of the procuring activity.

"Head of the Procuring Activity" means the Director, Acquisition Management Division.

§ 44-1.250 Contractor.

"Contractor" means any person, firm, association, or corporation entering into a contract with the Government.

§ 44-1.251 Subcontractor.

"Subcontractor" means any person, firm, association or corporation entering into a subcontract with a contractor or higher-tier subcontractor.

§ 44-1.252 Supplies and property.

"Supplies and property" means materials and goods to be delivered to the Agency under contracts or purchase orders.

§ 44-1.253 Personal services.

"Personal services" means those services rendered by an officially appointed or employed individual engaged in the performance of authorized Federal functions who is compensated on either a time or contract basis and is under the direct supervision of a Federal officer thereby establishing an employer-employee relationship.

§ 44-1.254 Nonpersonal services.

"Nonpersonal services" means those services rendered by non-Government firms, institutions or persons through contract or agreement with FEMA wherein no employer-employee relationship exists.

§ 44-1.255 Program office.

"Program office" means any of various offices within the Agency which generate requests for procurement action.

§ 44-1.256 Project officer.

"Project officer" means the representative of a program office cognizant over the technical aspects of a given procurement action.

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§ 44-1.257 Interagency agreement.

"Interagency agreement" means an agreement between two or more agencies, bureaus, or departments of the Federal Government by which supplies, services or property are provided to, or obtained from, one or more agencies, bureaus or departments of the Federal Government. Funds are transferred between the parties as consideration for the supplies, services or property.

§ 44-1.258 Memorandum of understanding.

"Memorandum of Understanding" means an agreement between two or more agencies, bureaus or departments of the Federal Government. Funds are not transferred between parties in a "Memorandum of Understanding."

Subpart 1.3—General Policies

§ 44-1.302 Procurement sources.

§ 44-1.302-1 General.

Supplies and services may be obtained from the following sources:

(a) *Government Program Sources.* Procuring offices shall endeavor to obtain required supplies or services from the following sources prior to initiating purchases from other sources. These sources shall be utilized to the maximum extent practicable in accordance with applicable laws and regulations and shall be solicited in the order in which they appear below:

(1) Agency inventories.

(2) Excess and surplus stocks in the possession of other Government agency.

(3) Federal Prison Industries, Inc.

(4) Committee for Purchase from the Blind and other Severely Handicapped.

(5) GSA Stock Program.

(6) Mandatory Federal Supply Schedule.

(7) Optional use Federal Supply Schedule.

(b) *Sources outside the Government.* If the required supplies and/or services cannot be obtained from any of the sources listed in paragraph (a) of this section, procuring offices shall endeavor to obtain them from commercial or other non-Government sources (including State and local Governments) to the maximum extent practicable.

(c) *Other Federal Agencies.* If supplies and/or services are available from another Federal agency, and the circumstances of the requirement meet the criteria set forth in OMB Circular A-76, procuring offices may obtain the supplies or services from that Federal agency.

§ 44-1.302-3 Contracts between the Government and Government employees or business concerns substantially owned or controlled by Government employees.

When a requisitioning office becomes aware that a suggested procurement source is either a Government employee, or a business or organization substantially owned by a Government employee, or the spouse or immediate family of a Government employee, the appropriate procurement office shall be immediately notified and shall seek alternative sources. If no alternative sources can be located, the requisitioning office shall prepare a written justification to clearly support a Contracting Officer decision to procure from the Government employee source and to provide for actions where possible, to prevent future related procurements from employee sources. Approval shall be obtained from the Head of the Program Office and the Director, Office of Finance and Administration prior to any procurement award to a Government employee source.

§ 44-1.305 Specifications.

§ 44-1.305-6 Military and departmental specifications.

If no Federal Specification is available, Interim Federal, Military and Departmental Specification shall be considered, in the order of precedence indicated herein, prior to using or developing other specifications.

§ 44-1.317 Noncollusive bids and proposals.

The authority to make the determination described in paragraph (d) of

the certification set forth in 41 CFR 1-1.317(a) shall vest in the Head of the Procuring activity without authority to redelegate.

Subpart 1.4—Procurement Responsibility and Authority

§ 44-1.400 Scope of subpart.

This subpart deals with the placement of procurement authority and responsibility within the Agency, the selection and designation of Contracting Officers, and the authority of procuring offices.

§ 44-1.401 Responsibility of the head of the procuring activity.

The Head of the Procuring Activity shall be responsible for the establishment of policy throughout the Agency, monitor in the overall effectiveness and efficiency of the Agency's procuring offices, the establishment of adequate controls to assure compliance with applicable laws, regulations and procedures, and shall be responsible for delegating or redelegating Contracting Officer authority, which has been delegated the Head of the Procuring Activity.

§ 44-1.404 Selection, designation and termination of designation of contracting officers.

§ 44-1.404-1 Selection.

In selecting Contracting Officers, the appointing authorities shall consider experience, training, education, business acumen, judgment, character, reputation and ethics. In the areas of experience, training and education the following shall be required unless contracting authority is limited to simplified purchase procedures. Waiver of any of the criteria set out below shall be in writing with specific justification therefor:

(a) Experience of an individual Contracting Officer or appointment of an individual to a position having contracting officer authority shall consist of a minimum of two years experience performing contracting, procurement or purchasing operations in a Government or commercial procurement office. Additionally where appointment of a Contracting Officer involves a specialized procurement field, experience in the field shall be considered as a criterion for the appointment.

(b) Educational requirements of an individual Contracting Officer or appointment of an individual to a position having contracting officer authority shall require as a minimum the equivalent of a bachelor's degree from an accredited college or institution with major studies in business administration, law, accounting or related fields. This educational requirement may be waived by the appointing official when it is determined that a potential appointee is otherwise qualified by virtue of extensive contract-related experience, training, business acumen, judgment, character, reputation and ethics.

(c) Training requirements of an individual Contracting Officer or appointment of an individual to a position having contracting authority as a minimum shall require that the individual has successfully completed training courses in Government basic procurement, of not less than 80 class hours, and Government contract administration, not less than 80 class hours. Incumbents not meeting the special training requirements shall be given 24 months to meet the minimum qualification standards.

§ 44-1.404-2 Designation.

Except for disaster-related activities and unusual circumstances as determined by the Head of the Procuring Activity, it is the policy of the Agency to delegate Contracting Officer authority to individuals rather than to positions. Except in those instances where the redelegation of authority specifically includes the authority for further redelegation to subordinate no other delegations or redelegations may be made. Delegations of Contracting Officer authority shall include clear statement of such authority, its responsibilities and limitations.

Subpart 1.6—Debarred, Suspended, and Ineligible Bidders

§ 44-1.600 Scope of subpart.

This subpart prescribes the FEMA policy and procedures for establish-

ment, use, maintenance and distribution of a debarred, suspended, and ineligible bidders list for debarring or suspending bidders for cause.

§ 44-1.602 Establishment, maintenance and distribution of a list of concerns or individuals debarred, suspended, or declared ineligible.

(a) The Director, Acquisition Management Division, is responsible for establishment and maintenance of a master list or file of firms and individuals who are administratively or legally debarred or suspended from FEMA contracting and subcontracting and from whom bids and proposals will not be solicited as provided in 41 CFR 1-1.603. This list will be known as the FEMA Debarred, Suspended and Ineligible Bidders List.

(b) The list shall as a minimum contain that information set forth in 41 CFR 1-1.602 (b).

(c) The Director, Acquisition Management Division, will effect distribution of the list to authorized personnel. The lists shall not be disclosed to the public.

§ 44-1.602-1 Basis for entry on the debarred, suspended, and ineligible bidders list.

(a) The list shall be comprised of those firms debarred, suspended or declared ineligible in accordance with 41 CFR 1-1.602-1 (a), (b), (c), and (e).

(b) The list shall also be comprised of those firms which the Director, Office of Finance and Administration, declares to be debarred, suspended or ineligible in accordance with 41 CFR 1-1.602-1 (d), (f), and (g).

§ 44-1.603 Treatment to be accorded firms and individuals in debarred, suspended or ineligible status.

The Director, Office of Finance and Administration, shall make the determinations required by 41 CFR 1-1.603 (a).

§ 44-1.604 Causes and conditions applicable to determination of debarment.

Determination to debar or take other action concerning a firm or individual for a cause listed in 41 CFR 1-1.604 shall be made by the Director, Office of Finance and Administration. Whenever cause for debarment becomes known to any Contracting Officer, the matter shall be submitted, with recommendations of the Director, Acquisition Management Division, to the Director, Office of Finance and Administration for appropriate action. The documented file of the case will be included in the submission.

§ 44-1.604-1 Procedural requirements relating to the imposition of debarment.

(a) Hearings requested in connection with debarment proceedings shall be conducted before the Director, Office of Finance and Administration, or his designee. An opportunity shall be afforded to the firm or individual to appear with witnesses and counsel, to present facts or circumstances showing cause why such firm or individual should not be debarred. If the firm or individual elects not to appear, or if the firm or individual does not respond within 30 days from receipt of the written notice, the reviewing authority will make the decision based on the facts on record and such additional evidence as may be furnished by the parties involved. After consideration of the facts, the reviewing authority shall notify the firm or individual of the final decision.

(b) Appeals may be taken within 30 days after receipt by the firm or individual of a decision to debar. Appeals shall be filed with Director, FEMA, who shall make a decision based on the record. The Director's decision shall be final.

§ 44-1.605 Suspension of bidders.

§ 44-1.605-1 Causes and conditions under which FEMA may suspend contractors.

Any Contracting Officer may recommend suspension of bidders for the causes and conditions set forth in 41 CFR 1-1.605-1. These recommendations shall be accompanied by the documented file in the case and be submitted through the Director, Acquisition Management Division, to the Director, Office of Finance and Administration. The Director, Office of Finance and Administration, shall issue the Notice of Suspension required by 41 CFR 1-1.605-2.

§ 44-1.606 Agency procedures.

The Director, Acquisition Management Division, is responsible for complying with the provisions of 41 CFR 1-1.606.

Subpart 1.7—Small Business Concerns

§ 44-1.700 General.

This subpart implements and supplements general policies and procedures set forth in 41 CFR Subpart 1-1.7.

§ 44-1.704 FEMA direction and operation.

FEMA shall implement the policies and procedures set forth in 41 CFR 1-1.7 through its small business advisor and its small business specialists.

§ 44-1.704-1 Small business advisor.

The Director, Acquisition Management Division, is hereby designated as FEMA's small business advisor for all procurement matters. The small business advisor is responsible for the establishment, implementation and execution of the small business procurement program. He is the central point of contact for inquiries concerning the program from industry, the Small Business Administration, the Congress, the Office of the Director and others. His duties include developing a plan of operation that will insure that an equitable share of contracts will be awarded to small businesses by the Agency. He will be assisted on a daily basis by the small business specialists.

§ 44-1.704-2 Small business specialists.

The small business advisor shall designate, by name and in writing, a small business specialist in each procuring office of FEMA, as appropriate, who shall be responsible for maintaining the program in that procuring office in accordance with the requirements of the FPR, the FEMAPR, and any further directives from the small business advisor. The small business specialist, for the Division of Acquistion Management at FEMA Headquarters, in addition to the above duties, shall act as coordinator for the small business activities in the other procuring offices and provide liaison between the other small business specialists and the small business advisor.

§ 44-1.705 Cooperation with the Small Business Administration.

§ 44-1.705-3 Screening of procurements.

FEMA has no SBA representative assigned to it on a full or part-time basis except to the extent that a representative of SBA regularly monitors the small business program within the Agency. Therefore, for all practical purposes, the small business specialists perform the duties of on-site SBA representatives. Accordingly, all proposed procurements estimated to exceed $10,000 will be reviewed by the small business specialists to identify those procurements which should be set aside in whole or in part for small business, unless the Head of the Procuring Activity determines in accordance with 41 CFR 1-1.705-3(a) that such review would unduly delay the procurement process. The small business specialist initiates recommendations to the Contracting Officer for small business set-asides for those individual procurements or classes of procurements, or portions thereof.

§ 44-1.706 Procurement set-asides for small business.

§ 44-1.706-2 Review of set-aside recommendatons initiated by small business specialist(s).

When the small business specialist recommends that all, or a portion, of an individual procurement or class of procurements be set aside for small business, the Contracting Officer shall promptly either (a) concur in the recommendation or (b) disapprove the recommendation, stating in writing his reasons for disapproval. If the Contracting Officer disapproves the recommendation of a small business specialist, the small business specialist may appeal to the Head of the Procuring Activity whose decision shall be final.

§ 44-1.706-3 Withdrawal or modification of set-asides.

A withdrawal or modification of an individual or class set aside which was originally established upon the recom-

mendation of the small business specialist may be proposed by the Contracting Officer by giving notice, containing the reason for the proposed withdrawal or modification, to the small business specialist. If the small business specialist does not agree to a withdrawal or modification, the Contracting Officer may appeal to the Head of the Procuring Activity whose decision shall be final.

§ 44-1.706-5 Small business class set-asides.

(a) A class set-aside is hereby made for each proposed procurement for construction which is not expected to exceed $1,000,000 in amount.

Accordingly, Contracting Officers shall set aside for small business each such proposed procurement. If a Contracting Officer determines that any individual procurement falling within the class set-aside requirements of this section is unsuitable for such a set-aside in part or in total, the set-aside may be withdrawn or modified in accordance with FEMAPR 44-1.706-3. Proposed procurements for construction which exceed an estimate of $1,000,000 shall be considered for set-aside on a case-by-case basis.

(b) A class set-aside is hereby made for each proposed procurement which is not expected to exceed $10,000. A written determination must be made by the Contracting Officer for each such procurement not awarded to a small business detailing the reasons therefor.

§ 44-1.706-50 Review of class set-aside programs.

Each procuring office shall forward a semi-annual report on class set-aside withdrawals to the Director, Acquisition Management Division. The Director, Acquisition Management Division, acting as the small business advisor, shall direct actions to be taken to improve small business participation under the class set-asides in FEMAPR 44-1.706-5.

§ 44-1.713 FEMA contracts with the Small Business Administration.

It is the policy of FEMA to increase small business participation in procurement programs by awarding procurement contracts, whenever feasible to the SBA as authorized by Section 8(a) of the Small Business Act (15 U.S.C. 637(a)) and the FPR.

§ 44-1.750 FEMA responsibilities and functions pursuant to Section 8(a) of the Small Business Act.

(a) *8(a) program responsibilities.* The FEMA Director for Small and Disadvantaged Business Utilization shall be responsible for the development and review of goals to be achieved under the 8(a) program and shall coordinate with the Director, the program offices, and the regional directors in establishing the level of FEMA's participation in the 8(a) program and the level of coordination with the small business advisor appropriate and necessary to definitize FEMA's plan for implementation of the 8(a) established goals.

In conjunction with this responsibility for establishing 8(a) goals, the Director for Small and Disadvantaged Business Utilization shall make available to the small business advisor 8(a) program guides for use by the small business specialists and Contracting Officers in making determinations on individual procurements that should be processed as an 8(a) contract to be awarded to SBA.

(b) *8(a) procurement responsibility.* The procurement and contracting aspects of this program shall be the responsibility of the small business advisor who shall assure that 8(a) procurement requirements are implemented through the small business specialists in each of their appropriate areas of assignment.

(c) *8(a) functions of the small business specialist.* The small business specialist(s) acting on behalf of the small business advisor, shall screen proposed solicitations to determine the feasibility of placement under the 8(a) program as part of the performance of those duties set forth under FEMAPR 44-1.704-1. The small business specialists, after consideration of the goals and guidance established pursuant to paragraph (a) of this section, shall make recommendations for 8(a) procurement to the Contracting

Officer, who may, in his discretion, contract with the Small Business Administration in accordance with 41 CFR 1-1.705-7 and 1-1.713.

(d) *8(a) reporting requirements.* The small business advisor shall report to the Director for Small and Disadvantaged Business Utilization on a quarterly basis covering the activities of the 8(a) program which report shall include the following:

(1) A narrative statement regarding the operation of the program during the three month period; and

(2) The number and dollar amount of awards made to small business under the 8(a) program.

Subpart 1.8—Labor Surplus Area Concerns

§ 44-1.800 Scope of subpart.

This subpart sets forth policies and procedures governing aid to sections classified as having concentrated unemployment or underemployment and areas of persistent or substantial labor surplus hereinafter referred to as labor surplus areas.

§ 44-1.803 FEMA direction and operation.

FEMA shall implement the policies and procedures set forth in 41 CFR 1-1.8 through its labor surplus area advisor and its labor surplus area specialists.

§ 44-1.803-1 Labor surplus area advisor.

The Director, Acquisition Management Division, is hereby designated as FEMA's labor surplus area advisor for all procurement matters. The labor surplus area advisor is responsible for the establishment, implementation and execution of the labor surplus area program within FEMA. He is the point of contact for inquiries concerning the program from industry, the Departments of Labor and Commerce, the Small Business Administration, the Congress, the Office of the Director and others. His duties include developing a plan of operation to increase the share of contracts awarded to labor surplus area concerns by FEMA. He will be assisted on a daily basis by the labor surplus area specialists.

§ 44-1.803-2 Labor surplus area specialists.

(a) The labor surplus area advisor shall designate, by name and in writing, a labor surplus area specialist in each procuring office of FEMA who shall be responsible for maintaining the program in those procuring offices in accordance with the requirements of the FPR, the FEMAPR and any further directives from the labor surplus area advisor.

(b) The labor surplus area specialist for the Acquisition Management Division at FEMA headquarters, in addition to the above, shall also act as coordinator for the labor surplus area activities in the other procuring offices and provide liaison between the other labor surplus area specialists and the labor surplus area advisor.

§ 44-1.803-3 Screening of procurements.

All proposed procurements estimated to exceed $10,000 shall be reviewed by the labor surplus area specialist to identify those procurements which should be set aside in whole or in part for labor surplus area concerns in accordance with 41 CFR 1-1.804-1 and to identify possible subcontracting opportunities for labor surplus area concerns. The labor surplus area specialist shall initiate recommendations to the Contracting Officer based upon these reviews for labor surplus area set-asides for those individual procurements or classes of procurements or portions thereof identified.

§ 44-1.803-4 Review of set-aside recommendations initiated by labor surplus area specialists.

When the labor surplus area specialist recommends that all, or a portion, of an individual procurement or class of procurements be set aside for labor surplus area concerns, the Contracting Officer shall promptly either (a) concur in the recommendation or (b) disapprove the recommendation, stating in writing his reasons for disapproval. If the Contracting Officer disapproves the recommendation, the labor surplus area specialist may appeal to the Head of the Procuring Activity whose decision shall be final.

§ 44-1.804 Partial set-asides for labor surplus area concerns.

§ 44-1.804-4 Withdrawal of set-asides.

A withdrawal of an individual or class set-aside which was originally established upon the recommendation of the labor surplus area specialist may be proposed by the Contracting Officer by giving written notice, containing the reason for the proposed withdrawal to the labor surplus area specialist. If the labor surplus area specialist does not agree to a withdrawal, the Contracting Officer may appeal to the Head of the Procuring Activity whose decision shall be final.

§ 44-1.804-50 Modifications of set-asides.

Modifications of set-asides shall be handled in the same manner as withdrawals of set-asides.

Subpart 1.10—Publicizing Procurement Actions

§ 44-1.1003-2 General requirements.

(a) Except in the instances described in 41 CFR 1-1.1003-2(a) (1) through (10) every proposed modification to, or exercise of an option on existing contracts, when new funds are obligated for additional supplies and services which may result in an award of $5,000 or more, shall be published promptly in the Commerce Business Daily.

(b) Synopses prepared in accordance with paragraph (a) above on procurements negotiated on a noncompetive basis, shall indicate that the procurement is being synopsized to show that the agency believes only one source to exist. Descriptions of noncompetitive procurements contained in such synopses shall be in such detail that a firm can clearly understand the requirement and thus decide on the basis of adequate information whether it has the ability to compete in performing the work.

§ 44-1.1003-4 Synopsis of subcontract opportunities.

In addition to the requirements of 41 CFR 1-1.1003-4, the Contracting Officer shall, unless not in the Government's best interest, make the source list on a solicitation available to those firms requesting such list for the purpose of seeking subcontracting opportunities on procurements exceeding $10,000.

Subpart 1.13—Small Business Concerns Owned and Controlled by One or More Socially and Economically Disadvantaged Individuals

§ 44-1.1300 Scope of subpart.

This subpart contains policies and procedures applicable to the participation in FEMA procurement of small business concerns owned and controlled by one or more socially and economically disadvantaged individuals.

§ 44-1.1302 Policy.

It is the policy of FEMA to foster and promote the participation of small business concerns owned and controlled by one or more socially and economically disadvantaged individuals in the Agency's procurement program and to offer guidance to such firms to the maximum extent practicable in order to enhance their ability to compete for the placement of FEMA procurement contracts.

§ 44-1.1303 Solicitation representation.

As with procurements over $10,000, it is desirable that a representation as a small business concern owned and controlled by one or more socially economically disadvantaged individuals be obtained from all bidders, offerors, and contractors for procurement under $10,000. Accordingly, procuring offices shall request, whether in a solicitation or otherwise, that all bidders, offerors and contractors, complete and return on a voluntary basis, the certificate set forth in 41 CFR 1-1.1303, indicating also the applicable solicitation number or purchase order number. Completion of the certificate shall not be regarded as a condition for award.

Subpart 1.50—Criteria for Use of Procurement Contracts Versus Assistance Instruments

§ 44-1.5000 Scope of subpart.

This subpart sets forth definitions for procurement contracts, grants and cooperative agreements and provides examples of each to allow for uniform selection of the proper instrument within FEMA.

§ 44-1.5001 Procurement Contracts.

§ 44-1.5001-1 Definition.

Procurement contracts are to be used whenever the principal purpose of the instrument is the acquisition by purchase, lease or barter of property or services for the direct benefit or use of the Federal Government.

§ 44-1.5001-2 Examples of procurement contracts.

Procurement contracts will normally be used when the principal purposes of the relationship is:

(a) Evaluation (including research of an evaluative character) of the performance of Government program, projects or grantee activity initiated by FEMA.

(b) Projects funded by administrative funds.

(c) Technical assistance rendered on behalf of the Government to any third party, including those receiving grants or cooperative agreements.

(d) Surveys, studies and research which provide specific information desired by the Government for its direct activities or for dissemination to the public.

(e) Consulting or professional services of all kinds if provided to the Government or, on behalf of the Government, to any third party.

(f) Planning for Government use.

(g) Conferences conducted in behalf of the Government.

(h) Production of publications or audiovisual materials required primarily for the conduct of the direct operations of the Government.

(i) Design or development of items for Government use or pursuant to agency definition or specifications.

(j) The generation of management information or other data for Government use.

§ 44-1.5002 Assistance.

Assistance may take the form of either grants or cooperative agreements and include:

(a) General financial assistance (stimulation or support) to eligible recipients under specific legislation authorizing such assistance.

(b) Financial assistance (stimulation or support) to a specific program activity eligible for such assistance under specific legislation authorizing such assistance.

§ 44-1.5002-1 Grants.

Grants are to be used whenever the principal purpose of the relationship is the transfer of money, property, services or anything of value to a recipient to accomplish a public purpose of support or stimulation authorized by Federal statute and substantial involvement is not anticipated.

§ 44-1.5002-2 Cooperative agreements.

Cooperative agreements are to be used whenever the principal purpose of the relationship is the transfer of money, property, service or anything of value to recipients to accomplish a public purpose of support or stimulation authorized by Federal statute and substantial involvement is anticipated.

§ 44-1.5002-3 Examples of involvement that is not substantial.

Involvement is not substantial and therefore a grant is the proper instrument if the following types of involvement are planned:

(a) Approval of recipient plans prior to award.

(b) Normal Federal stewardship such as site visits, performance reporting, financial reporting and audits to insure that objectives, terms and conditions of the grants are met.

(c) Unanticipated involvement to correct deficiencies in project or financial performance from the terms of the grants.

(d) General statutory requirements understood in advance of the award such as civil rights, environmental pro-

tection and provision for the handicapped.

(e) Review of performance after completion.

(f) General administrative requirements, such as those included in OMB Circulars A-21, A-95, A-110 and A-102.

§ 44-1.5002-4 Examples of substantial involvement.

Involvement is substantial and a cooperative agreement is the proper instrument when the following types of involvement are planned.

(a) Agency review and approval of one stage before work can begin on a subsequent stage during the period covered by the cooperative agreement.

(b) Agency and recipient collaboration or joint participation in the performance of the assisted activities.

(c) Highly prescriptive agency requirements prior to award limiting recipient discretion with respect to scope of services offered, organizational structure, staffing, mode of operation, and other management processes, coupled with close agency monitoring or operational involvement during performance over and above the normal exercise of Federal stewardship responsibilities to ensure compliance with these requirements.

(d) General administrative requirements beyond those included in OMB Circulars A-102 and A-110.

PART 44-2—PROCUREMENT BY FORMAL ADVERTISING

Sec.

44-2.000 Scope of part.

Subpart 2.1—Use of Formal Advertising

44-2.106 Procurement management reviews.

Subpart 2.2—Solicitation of Bids

44-2.201 Preparation of invitation for bids.
44-2.202 Miscellaneous rules for solicitation of bids.
44-2.202-1 Bidding time.
44-2.202-2 Telegraphic bids.
44-2.202-3 Place and method of delivery of supplies.
44-2.202-4 Bid samples.
44-2.202-50 Extension of time for bid opening.
44-2.202-51 Pre-bid conferences.
44-2.202-52 Bid envelopes.
44-2.205 Bidders mailing lists.
44-2.205-1 Establishment of lists.
44-2.250 Small business concerns owned and controlled by one or more socially and economically disadvantaged individuals and labor surplus area concerns.

Subpart 2.3—Submission of Bids

44-2.301 Responsiveness of bids.
44-2.303 Late bids.
44-2.303-6 Notification to late bidders.
44-2.303-7 Disposition of late bids.

Subpart 2.4—Opening of Bids and Award of Contract

44-2.401 Receipt and safeguarding of bids.
44-2.402 Opening of bids.
44-2.402-50 Time of acceptance and withdrawal of bids.
44-2.406 Mistakes in bid.
44-2.406-3 Other mistakes disclosed before award.
44-2.407 Award.
44-2.407-8 Protests against award.

Subpart 2.5—Two-Step Formal Advertising

44-2.502 Conditions for use.

AUTHORITY: Sec: 205(c), 63 Stat. 390; 40 U.S.C. 486(c); Reorganization Plan No. 3 of 1978, 43 FR 41943.

SOURCE: 45 FR 55353, Aug. 19, 1980, unless otherwise noted.

§ 44-2.000 Scope of part.

This part implements and supplements the basic requirements for procurement of personal property and non-personal services (including construction) by formal advertising, and establishes policies with respect to solicitation of bids, submission of bids, opening and evaluation of bids and the awarding of contracts as set forth in 41 CFR Part 1-2.

Subpart 2.1—Use of Formal Advertising

§ 44-2.106 Procurement management reviews.

The Policy and Support Branch of the Acquisition Management Division shall be responsible for meeting the requirements of 41 CFR 1-2.106.

Subpart 2.2—Solicitation of Bids

§ 44-2.201 Preparation of invitation for bids.

Forms used in the preparation of invitations for bids are prescribed in 41 CFR Subparts 1-16.1 and 1-16.4 and Part 16 of the FEMAPR.

§ 44-2.202 Miscellaneous rules for solicitation of bids.

§ 44-2.202-1 Bidding time.

In the procurement of supplies and services, the following shall be observed:

(a) Procurement action which does not provide for the minimum bidding time required by 41 CFR 1-2.202-1(c) shall be justified by the Contracting Officer prior to releasing the invitation for bids. This justification shall take the form of a finding of fact which establishes the Contracting Officer's basis for the exception to the minimum bidding time.

(b) The minimum bidding time stipulated in 41 CFR 1-2.202-1(c) shall not be construed as a maximum. Each prospective procurement shall be examined on its own merits to determine the bidding time that will facilitate competition on reasonable and equal terms. As a general rule, procurement of a less complicated nature for which no extensive bid preparation by the prospective bidder is required in development of his bid may contain a bidding time of 20 calendar days. Where the specification may require prospective bidders to develop drawings or samples, or to do extensive preparation in developing a meaningful bid, 30 calendar days or more of bidding time may be required.

§ 44-2.202-2 Telegraphic bids.

Telegraphic bids will be authorized only by the Contracting Officer who shall document the official procurement file as to the necessity of telegraphic bids. Conditions under which telegraphic bids may be authorized are set forth in 41 CFR 1-2.202-2. When telegraphic bids are authorized by the Contracting Officer, a clause shall be incorporated in the invitation for bids, authorizing such bids and providing instructions on their submission in accordance with 41 CFR 1-2.202-2(a).

§ 44-2.202-3 Place and method of delivery of supplies.

To the maximum extent practical, invitations for bids issued by FEMA shall stipulate "f.o.b. destination." Only where the Contracting Officer determines in writing that it is in the Government's best interest may he deviate from this policy.

§ 44-2.202-4 Bid samples.

Bid samples submitted by bidders as required by an invitation for bids or as unsolicited samples, if not returned in accordance with 41 CFR 1-2.202-4(h), shall be disposed of by the contracting officer who shall document the contract file as to the method of disposition.

§ 44-2.202-50 Extension of time for bid opening.

Whenever such action is determined by the Contracting Officer to be in the best interest of the Government, bid openings may be rescheduled for a later date by issuance and distribution of an amendment (See 41 CFR 1-2.207) to the invitation for bids. Notices of change in bid opening date shall specify the exact time and date for the new opening and will be issued by mail or telegram as soon as possible, but, in any event, prior to the time specified for the opening of bids.

§ 44-2.202-51 Pre-bid conferences.

Whenever a pre-bid conference is proposed for a formally advertised procurement the following will be applicable:

(a) *General.* One of the essential elements of formal advertising is that all bidders are afforded an equal opportunity to compete. For this reason, discussions with prospective bidders will only be conducted by or with the knowledge and approval of the Contracting Officer. It is incumbent upon the Contracting Officer to avail all prospective bidders of the same information so as not to give one an advantage over the others. The need for pre-bid conferences in advertised procurements should be infrequent and such

conferences shall not be used as a substitute for formally amending defective or ambiguous solitations or to disseminate additional specification requirements. A pre-bid conference is only authorized when it is deemed by the Contracting Officer to be in the best interest of the Government and approved by the Head of the Procuring Activity or when written internal program policy requires it under certain specified circumstances.

(b) *Purpose.* A pre-bid conference is held to accomplish these primary objectives:

(1) To provide discussion of unusual aspects of complex procurements.

(2) To impart information that removes areas of performance uncertainties which, unless removed, result in higher price to the Government, i.e., inclusion in the bid of an amount for the uncertainty or contingency.

(3) To avoid post-award performance problems which firms could have been made aware of at the time of bid preparation.

(c) *Format.* The typical format of a pre-bid conference is a formal presentation by the Contracting Officer or his representative followed by a question and answer period. All prospective bidders and their subcontractors shall be invited to the meeting in a manner deemed appropriate by the Contracting Officer. When held, a pre-bid conference shall be scheduled sufficiently in advance of the date set for bid opening to permit prospective bidders to use the information. A written record of the pre-bid conference shall be made and maintained in the procurement file as the office record of what was presented at the conference.

(d) *Conclusion.* As a result of the pre-bid conference, it may become necessary to change or substantially clarify the invitation for bid. This action shall be transmitted to all those receiving invitation for bids in the form of an official amendment to the solicitation, taking into consideration any extension of the closing date for the receipt of bids.

§ 44-2.202-52 Bid envelopes.

Mailing labels, or envelopes, bearing "Postage and Fees Paid" indicia shall not be distributed with the invitation for bids or otherwise supplied to prospective bidders. To provide for ready identification and proper handling of bids, the Optional Form 17, "Sealed Bid Label" may be furnished with each bid set to inform the bidder as to what will be required on the bid envelope. 41 CFR 1-16.902-OF17 illustrates the referenced form and copies of same can be obtained from the General Services Administration.

§ 44-2.205 Bidders mailing lists.

§ 44-2.205-1 Establishment of lists.

New prospective suppliers that have been added to the bidders mailing list shall be notified by the procuring office by a letter so indicating.

§ 44-2.250 Small business concerns owned and controlled by one or more socially and economally disadvantaged individuals and labor surplus area concerns.

It is the policy of FEMA to send preinvitation notices to all small business concerns owned and controlled by one or more socially and economically disadvantaged individuals and labor surplus area concerns that are on the bidder's mailing list for each procurement expected to result in an award in excess of $10,000, subject to the provisions of § 44-1.1302.

Subpart 2.3—Submission of Bids

§ 44-2.301 Responsiveness of bids.

Any bid which is not signed by the bidder or his authorized representative shall be disregarded, except when it is accompanied by other evidence which demonstrates the bidder's intention to be bound by the unsigned bid document. An example of such evidence is a bid guarantee or a letter (which does not qualify or otherwise render the bid non-responsive) signed by the bidder referring to, and clearly identifying the bid itself. In such a case, the Contracting Officer may waive the deficiency as a minor informality or irregularity (see 41 CFR 1-2.405) and shall document the file to so indicate.

§ 44-2.303 Late bids.

§ 44-2.303-6 Notification to late bidders.

In setting the date to be inserted in the notice to late bidders contained in 41 CFR 1-2.303-6, consideration should be given to the time required by the bidder to develop and prepare the required evidence in relation to the acceptance period specified by the otherwise apparent low bidder, avoidance of undue delay in the procurement cycle, and other pertinent factors. As a general rule, the bidder should be allowed a minimum of three (3) working days in addition to a time allowance for transmitting the notice to, and receipt of the evidence by, the Contracting Officer. The bidder shall be notified immediately in writing if his bid cannot be considered for award because of lateness.

§ 44-2.303-7 Disposition of late bids.

The return of a late bid which cannot be considered for award shall be accompanied by a statement from the Contracting Officer that the bid was not considered because of its late receipt. If the late bid had to be opened for identification purposes or was opened by mistake, this fact shall be included in the statement from the Contracting Officer accompanying the returned bid. In all cases where a late bid is not considered and returned to the bidder, the file shall be documented with all information relating to the determination of late receipt which shall include a copy of the late bid envelope.

Subpart 2.4—Opening of Bids and Award of Contract

§ 44-2.401 Receipt and safeguarding of bids.

(a) Envelopes or other outer coverings containing identified bids shall be stamped or otherwise marked to show the office of receipt, the time of day received and the date. The individual receiving the bids shall then place his initials under the above marking.

(b) The Contracting Officer shall, in addition to the requirements of 41 CFR 1-2.401(b), retain in the file a copy of the envelope, wrapper or other container bearing the required documentation of a bid which was opened by mistake or for purposes of identification.

§ 44-2.402 Opening of bids.

(a) The Contracting Officer, or his duly authorized representative, shall be designated as the bid opening officer. At the bid opening, the relative merits of any bids shall not be discussed by any person from the procuring office. No statement shall be made at the bid opening by any person from the procuring office regarding the award, the possibility of a readvertisement, mistakes in bids, the responsiveness of any bid or responsibility of any bidder, etc.

(b) Inquiries or protest received during the bid opening regarding award of the contract shall be referred to the Contracting Officer for resolution after the completion of the bid opening. Bidders are cautioned that information obtained at the bid opening from persons other then the Contracting Officer may only be relied upon by the bidder at the bidder's own risk. After all bids have been opened, read aloud and recorded, the bid opening officer shall state that opening of bids has been completed.

§ 44-2.402-50 Timing of acceptance and withdrawal of bids.

Bidders may not withdraw their bids after bid opening unless the notice of withdrawal was mailed prior the time set for bid opening and handled in accordance with 41 CFR 1-2.305.

§ 44-2.406 Mistakes in bid.

§ 44-2.406-3 Other mistakes disclosed before award.

The Director, Acquisition Management Division, is delegated the authority to make the determinations required by 41 CFR 1-2.406-3 concerning mistakes in bid other than obvious clerical errors discovered prior to award. Each such determination shall be approved by the Office of General Counsel prior to notification of the bidder.

§ 44-2.407 Award.

§ 44-2.407-8 Protests against award.

(a) *General.* (1) Resolution of protests to the contracting activity shall be pursued initially by the Contracting Officer. If the protest cannot be resolved, or if the protest has been filed with GAO, the Contracting Officer shall forward a report to the HPA. The report shall consist of the documents set forth in 41 CFR 1-2.407-8(a)(2). The HPA shall either recommend a course of action to the Contracting Officer or forward the Contracting Officer's report to the Office of General Counsel. The Office of General Counsel is the FEMA liaison with GAO. All communication with GAO concerning a protest shall be coordinated through the HPA and the Office of General Counsel.

(2) A protestor shall be notified of the final decision of his protest to the Contracting Officer within thirty (30) working days after receipt of his protest. A formal report to GAO shall be submitted to GAO within twenty-five (25) working days after receipt of the request. In order to assure compliance with these dates, the contracting office shall submit his report to the HPA within ten (10) working days of receipt of the protest or request for comments from GAO. If the GAO has requested comments, the Contracting Officer's submission to the HPA shall include the names and addresses of interested parties along with copies of the report for GAO and each interested party.

(b) *Protests before award.* Where the Contracting Officer makes a determination to award a contract notwithstanding a protest, approval shall be obtained from the HPA prior to making the award. The Contracting Officer shall forward a written determination, made in accordance with 41 CFR 1-2.407-8(b)(4), to the HPA along with the request for approval to make award. The HPA shall notify the Office of General Counsel prior to authorizing award of a contract when the protest has been filed with GAO.

(c) *Protests after award.* In addition to the requirements of 41 CFR 1-2.407-8(a)(2), the Contracting Officer's report shall contain the following:

(1) Current status of the contract, indicating whether performance has commenced, shipment or delivery has been made or a stop work order has been issued, and

(2) Copies of any mutual agreement with the contractor, if applicable, to suspend performance.

(d) *Timeliness.* Protest filed with the Contracting Officer shall be filed to be received at the procuring office not later than five (5) working days after the basis for protest is known or reasonably should have been known, whichever is earlier.

(e) *Records.* The HPA shall maintain records relating to all protests received. The records shall contain adequate data to show the number and nature of formal protests received (whether filed directly with FEMA or with GAO), their disposition and the time for resolutions. These records will be reviewed annually in order to update protest procedures.

Subpart 2.5—Two-Step Formal Advertising

§ 44-2.502 Conditions for use.

Pursuant to 41 CFR 1-2.502, approval must be obtained from the Head of the Procuring Activity before the two-step formal advertising method of procurement may be used.

PART 44-3—PROCUREMENT BY NEGOTIATION

Sec.

44-3.000 Scope of part.

Subpart 3.1—Use of Negotiation

44-3.100 Scope of subpart.
44-3.101-50 Noncompetitive procurement.
44-3.101-51 Preference for local contractors in Presidentially declared major disasters or emergencies.
44-3.103 Dissemination of procurement information.
44-3.103-50 Preproposal conferences.
44-3.150 Treatment of proposal information.
44-3.150-1 General.
44-3.150-2 Disposition of unsuccessful proposals.
44-3.150-3 Use of successful proposals.

Subpart 3.4—Types of Contracts

Sec.
44-3.400 Scope of subpart.
44-3.405-3 Cost-sharing contract.
44-3.408 Letter contract.

Subpart 3.7—Negotiated Overhead Rates

44-3.700 Scope of subpart.
44-3.702 General.
44-3.707 Overhead ceilings.

Subpart 3.8—Price Negotiation Policies and Techniques

44-3.800 Scope of subpart.
44-3.801-2 Responsibility for determination of final price.
44-3.802 Preparation for negotiation.
44-3.802-2 Alternate procedures for consideration of late proposals.
44-3.805 Selection of offerors for negotiation and award.
44-3.805-50 Source selection procedures.

Subpart 3.51—Protests Against Award

44-3.5101 Negotiated procurement protests.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); Reorganization Plan No. 3 of 1978, 43 FR 41943.

SOURCE: 45 FR 55355, Aug. 19, 1980, unless otherwise noted.

§ 44-3.000 Scope of part.

This part prescribes policies and procedures which shall be observed by FEMA procuring offices in connection with procurement by negotiation.

Subpart 3.1—Use of Negotiation

§ 44-3.100 Scope of subpart.

This subpart sets forth policies and procedures concerning exceptions to normal negotiation procedures and the dissemination of procurement information.

§ 44-3.101-50 Noncompetitive procurement.

(a) *General.* FEMA procurement shall be accomplished on a competitive basis to the maximum extent practicable. Procurement without competition shall be limited to those circumstances in which only one firm, organization or individual can provide the required supplies or services.

(b) *Justification for noncompetitive procurement.* In order for procurement on a noncompetitive basis to be approved, the justification must demonstrate that one of the following criteria has been met:

(1) The recommended source possesses a unique characteristic or capability that serves to make that source the only one able to provide the required product or service and all other sources unable to provide the product or service.

(2) The proposed procurement is for replacement of components for equipment specially designed by a manufacturer and available data is not adequate to assure that replacement parts or components, if provided by a source other than the manufacturer of the equipment, would be compatible with, or perform the same function as, the parts or components being replaced.

(c) *Exclusions.* The provisions of FEMAPR 44-3.101-50(a) do not apply to the following:

(1) Procurement of $500 or less.

(2) Procurement from or through other Government Agencies.

(3) Procurements of architect-engineer services.

(4) Procurements of utility services where the services are available from only one source.

(5) Procurements with the Small Business Administration.

(6) Purchases from mandatory Federal Supply Schedule contracts which list only one source.

(d) *Approvals.* Program offices are responsible for submitting to the procuring office a detailed recommendation of the factual circumstances justifying noncompetitive procurement. The Contracting Officer shall execute a written justification either approving or disapproving the non-competitive procurement. The justification shall state that the circumstances set forth in the justification do or do not meet the noncompetitive procurement criteria set forth in FEMAPR 3.101-50(b): It shall also set forth the reasons why these circumstances do or do not meet these criteria. The Contracting Officer shall then forward the justification, along with the contract file, to the following approval levels prior to issuance of a solicitation:

(1) Procurements over $500 but not over $10,000—Contracting Officer.

(2) Procurements over $10,000 but not over $100,000—level higher than the Contracting Officer.

(3) Procurements over $100,000 but not over $500,000—the Head of the Procuring Activity.

(4) Procurements over $500,000—the Director, Office of Finance and Administration.

§ 44-3.101-51 Preference for local contractors in Presidentially declared major disasters or emergencies.

(a) *Scope of subsection.* This subsection establishes policies relating to local contractor preference to receive procurement awards resulting from competitively negotiated solicitations under a Presidentially-declared major disaster or emergency operation.

(b) *Geographical coverage.* The geographic areas to which local contractor preference shall apply are those affected by the Presidentially-declared disaster and designated by the Associate Director for Disaster Response and Recovery in the FEDERAL REGISTER. Geographical areas shall be identified by county or other political subdivision.

(c) *Procurement for implementation of the procurement of supplies and services for disaster relief response.* Pursuant to the provisions of Pub. L. 93-288, the clause set forth below shall be included in each competitively negotiated solicitation for disaster relief response.

PROVISION FOR COMPETITIVELY NEGOTIATED SOLICITATIONS

In awarding any contract(s) pursuant to this solicitation, the Government shall give preference to local organizations, firms and individuals residing or doing business primarily in the geographic area identified as the disaster area by the Associate Director for Disaster Response and Recovery.

The Contracting Officer reserves the right to request offerors to furnish documentation to demonstrate eligibility for local contractor preference. To be eligible for local contractor preference, the offeror shall have been residing (in the case of individuals) or doing the major portion of its business (in the case of business entities) in the disaster area.

Offerors for which eligibility is established (local offerors) shall be permitted to reduce their proposed price to meet the lowest price received from an otherwise eligible non-local offeror, provided that the proposed price from the local offeror(s) does not exceed 130% of the price received from the non-local offeror. The lowest priced local offeror within 130% of the lowest non-local price shall be given the initial opportunity to meet the non-local price. If the local offeror meets the lowest non-local price and is determined to be responsible, award shall be made. If the non-local offer is not met, the next lowest local offeror within 130% shall be given an opportunity to meet the lowest non-local price. This process shall continue until award is made to a local offeror within the 130% requirement or the supply of such local offerors is exhausted and award made to the lowest non-local offerors.

(d) *Exception to use of local preference provisions.* If it is determined by the Contracting Officer to be in the best interest of the Government the clause set forth in paragraph (c) need not be included in solicitations. Such determination shall be documented in the contract file with a findings and determination signed by the Contracting Officer and approved by the Head of the Procuring Activity.

(e) *Additional methods for encouraging local participation.* In the event the Contracting Officer makes the determination of paragraph (d) of this section, local participation may be encouraged by:

(1) Setting the procurement aside for labor surplus area if the disaster area has been established as a labor surplus area;

(2) Advertising only in the local disaster area; and/or

(3) Subdividing large requirements into several smaller requirements.

§ 44-3.103 Dissemination of procurement information.

(a) *Publicizing procurement actions.* The agency shall continually search for and develop information on sources (including small businesses owned and controlled by one or more socially or economically disadvantaged individuals) competent to provide supplies or services. Advance publicity, including use of the Commerce Business Daily to the fullest extent practicable, shall be given for this purpose. The search should include (a) a review of relevant data or brochures furnished by sources seeking to do business with the agency and (b) a cooperative effort

by program personnel, small business specialists and Contracting Officers to obtain information and recommendations with respect to potential sources and to consider the desirability of seeking other sources by publication of proposed procurements, in addition to the synopsis requirements. Each procuring office shall use to the maximum extent practicable its bidders mailing list for soliciting competition.

(b) *Release of information during the solicitation phase.* No information shall be released during the solicitation phase of a procurement except as follows:

Each solicitation for a negotiated procurement shall specify an individual within the procuring office who shall be responsible for responding to inquiries concerning the solicitation and evaluation of proposals resulting from the solicitation. All questions concerning the solicitation, whether of a procedural or substantive nature, shall be directed to the above individual. All other personnel will avoid exchange of comments with all offerors or potential offerors. Answers to questions requiring clarification of the substantive portion of the solicitation shall be provided by amendment to the solicitation a copy of which shall be furnished to each recipient of the solicitation.

(c) *Release of information during the evaluation phase.* During the course of evaluating proposals, personnel involved in this activity shall not reveal any information concerning the evaluation of proposals to anyone who is not also participating in the same evaluation proceedings, except as may be required for internal clearances. However, the Contracting Officer, upon determination that a proposal is unacceptable, or not within the competitive range, shall provide prompt notice of the fact to the offeror submitting the proposal. In addition to stating that the proposal has been determined to be unacceptable, or not within the competitive range, the notice to the offeror shall indicate, in general terms, the basis for such determination and shall advise the offeror that since further negotiation with him is not contemplated, a revision of his proposal will not be considered. Such notice need not be given if (a) in the judgment of the Contracting Officer, the disclosure will prejudice the Government's interest (the possibility of protest shall not be considered prejudicial), or if the proposed contract is to be awarded within a few days and notice pursuant to 41 CFR 1-3.103 would suffice. This notification procedure shall not apply to procurements negotiated pursuant to 41 U.S.C. 252(c) (4), (5) or (6); negotiated with a foreign supplier when only foreign sources of supplies or services have been solicited; or urgent procurement actions which the Contracting Officer determines in writing must be awarded without delay to protect the public interest. The Contracting Officer's determination shall be placed in the contract file.

(d) *Post-award release of procurement information.* Promptly after making award of any procurement in excess of $10,000, the Contracting Officer shall, if he has not done so pursuant to FEMAPR 44-3.103(c), give written notice to the unsuccessful offerors that their proposals were not accepted. The notice should name the successful contractor and state the amount of the award and the number of proposals received. Where additional information is requested by the offeror, it shall be provided as follows:

(1) It is the policy of FEMA to provide a debriefing to any unsuccessful offeror who makes a written request to the Contracting Officer within two (2) months after contract award.

(2) A debriefing is intended to:

(i) Tell an unsuccessful offeror which areas of his proposal were judged to be weak or deficient and whether the weaknesses or deficiencies were factors in his not having been selected.

(ii) Identify the factors which were the basis for selection of the successful contractor. If the quality of the successful offeror's proposal to satisfy the mission requirement was the basis, the unsuccessful offeror should be so informed and given a general comparison of significant areas, but not a point by point comparison of all the elements considered in the evaluation criteria.

(3) A debriefing should not reveal:

(i) Confidential business information, trade secrets, techniques, or processes of the other offerors; and

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(ii) The relative merits or technical standing of the unsuccessful offerors or the scoring by the Source Evaluation Board or Technical Evaluation Panel.

(4) Any FEMA official who receives from an unsuccessful offeror a request, written or oral, for a debriefing shall immediately refer the request to the appropriate procuring office which shall make the necessary arrangements for the debriefing.

(5) It is essential that the debriefing be conducted in a scrupulously fair, objective and impartial manner, and that the information given be factual and consistent with the findings of the evaluation and the basis on which the source selection official made his decision.

(6) It is most important that all FEMA personnel engaged in the evaluation and selection process be aware of the foregoing policies and procedures. Detailed and complete records will be maintained by key technical and business participants in a manner which will facilitate either a written or oral debriefing of any unsuccessful offeror's proposal.

§ 44-3.103-50 Preproposal conferences.

In cases of complex procurement, preproposal conferences may be used to explain complicated specifications and requirements to prospective offerors so as to permit them to submit proposals without undue expenditure of effort, time and money. Attendance at the preproposal conference shall not be used as a method for prequalification of offerors. The preproposal conference may only be used when approved by the Head of the Procuring Activity. The preproposal conference shall be arranged and conducted by the Contracting Officer or his representative with participation by technical, legal and such other personnel as appropriate. All prospective offerors shall be furnished identical information in connection with the proposed procurement. Remarks and explanations at the conference shall not qualify the terms of the solicitation and specifications. All conferees shall be advised that unless the solicitation is amended in writing it will remain unchanged and that if an amendment is issued, normal procedures relating to the acknowledgement and receipt of solicitation amendments shall be applied. A complete record shall be made of the conference. The record shall be made available to those requesting it.

§ 44-3.150 Treatment of proposal information.

§ 44-3.150-1 General.

It is the general policy of FEMA to use information contained in proposals only for evaluation purposes except to the extent such information is generally available to the public, is already the property of the Government or the Government already has unrestricted use rights, or it is, or has been made available to the Government from other sources, including the offeror, without restriction.

§ 44-3.150-2 Disposition of unsuccessful proposals.

Unsuccessful proposals shall be disposed of as follows:

(a) All but one copy of each unsuccessful proposal shall be destroyed upon contract award. The one remaining copy of each unsuccessful proposal shall be retained in the official contract file for six (6) months at the end of which time it may be destroyed.

(b) Unsuccessful proposals shall not be used for purposes other than internal reference unless (1) written permission has been obtained from the offeror or (2) the proposal expressly states that unrestricted use of the proposal is given to the Government regardless of its success in the competition or (3) any of the conditions described in FEMAPR 44-3.150-1 exist.

§ 44-3.150-3 Use of successful proposals.

The Government shall normally be accorded unrestricted use of successful proposals. In the event that the successful offeror desires to place restrictions on the use of his proposal, the terms and extent of such restrictions may be set forth in the resulting contract. In any event the Freedom of Information Act will govern.

Subpart 3.4—Types of Contracts

§ 44-3.400 Scope of subpart.

This subpart sets forth policies and procedures concerning the use of cost-sharing contracts.

§ 44-3.405-3 Cost sharing contract.

(a) *Purpose.* This subsection sets forth basic guidelines governing cost-sharing on research contracts with non-Federal organizations.

(b) *Basic guidelines.* (1) Cost sharing with non-Federal organizations shall be encouraged in contracts for basic or applied research in which the parties have considerable mutual interest in the research.

(2) Contracting Officers shall assure themselves of the following in the determination of contract type.

(i) The research effort has more than minor relevance to the non-Federal activities of the performing organization and the research is not primarily a service to the government;

(ii) The performing organization has adequate non-Federal sources of funds from which to make a cost contribution;

(iii) The performing organization conducts production or other service activities, as opposed to being primarily engaged in research and development, and is in a favorable position to make a cost contribution;

(iv) The principle purpose of the contract is research as opposed to the production of, or design, testing or improving of products, materials, devices, systems or methods.

(v) Payment of the full cost of the project is not necessary in order to obtain the services of the particular organization.

(3) FEMA's Appropriation Act includes provisions requiring cost sharing by the contractor under research contracts resulting from unsolicited proposals. This requirement may only be wavied when the offeror certifies in writing to the Contracting Officer that it has no commercial, production, educational or service activities on which to use the results of the research and that it has no means of recovering any cost sharing on such projects. In situations such as the foregoing, the Contracting Officer may determine that there is no measurable gain to the performing organization and no mutuality of interest; therefore, it would not be equitable for the Government to require cost sharing. Such determinations shall be in writing and placed in the file.

(c) *Guidelines for determining the amount of cost sharing.* (1) For educational institutions and other not-for-profit or nonprofit organizations, cost sharing normally may vary from 1 percent to as much as 50 percent of the costs of the project. In some cases it may be appropriate for educational institutions to provide a higher degree of cost sharing, such as when the cost of the research consists primarily of the academic year salary of faculty members, or when the equipment acquired by the institution for the project will be of significant value to the institution in its educational activities.

(2) The amount of cost participation by commercial or industrial organizations may vary from as little as 1 percent or less of the total project cost to more than 50 percent of total project cost, depending upon the extent to which the research effort is likely to enhance the performing organization's capability, expertise or competitive position and the value of such enhancement to the performing organization. It should be recognized that those organizations which are predominately engaged in research and development and have little or no production or other service activities may not be in a favorable position to derive a monetary benefit from the research under Federal agreements.

(3) A fee or profit will usually not be paid to the performing organization if the organization is to contribute to the cost of the research effort, but the amount of cost sharing may be reduced to reflect the fact that the organization is foregoing its normal fee or profit on the research. However, if the research is expected to be of only minor value to the performing organization and if cost-sharing is not required by statute, it may be appropriate for the performer to make a contribution in the form of a reduced fee or profit, rather than sharing the costs of the project.

(4) Each cost-sharing contract negotiated by the agency shall contain the clause included in FEMAPR 44-7.500 2-9.

§ 44-3.408 Letter contract.

Prior to the award of a letter, contract the Contracting Officer shall make a determination that no other type of contract is suitable under the circumstances surrounding the procurement and shall support this determination by detailing the reasons why no other type of contract is suitable. The determination and supporting documentation shall then be submitted to, and must be approved by, the Head of the Procuring Activity before the letter contract may be awarded.

Subpart 3.7—Negotiated Overhead Rates

§ 44-3.700 Scope of subpart.

This subpart sets forth policies and procedures concerning negotiated overhead rates for use in cost-reimbursement type contracts.

§ 44-3.702 General.

(a) When a contractor performs work in the same period under several contracts for one or more procuring offices or agencies, it may be desirable and appropriate, when mutually agreed to by FEMA and the contractor, to negotiate uniform overhead rates for application to all such contracts in order to (1) effect uniformity of approach, (2) effect economy in administrative effort, and (3) promote timely settlement of reimbursement claims.

(b) When the Contracting officer determines that the above conditions exist, he shall include the negotiated overhead rate clause set forth in 41 CFR 1-3.704-1.

(c) If the prospective cost-reimbursement contract is the only contract to be performed by the contractor for the Government during a given period or if the Contracting Officer determines that it is not appropriate to include the clause specified in 41 CFR 1-3.704-1, determination of the reimbursable amount of the overhead under the contract shall be based upon final audit of the actual costs incurred during the period of performance and the clause set forth in FEMAPR 44-7.500 2-6 shall be included.

§ 44-3.707 Overhead ceiling.

When the Contracting Officer determines in accordance with 41 CFR 1-3.707 that it is appropriate to place an overhead ceiling in the contract, he shall include the clause set forth in FEMAPR 44-7.500 2-8.

Subpart 3.8—Price negotiation Policies and Techniques

§ 44-3.800 Scope of subpart.

This subpart sets forth policies and procedures concerning final price negotiation, consideration of late proposals, and source selection.

§ 44-3.801-2 Responsibility for determination of final price.

In the event a contractor insists on a price or demands a profit or fee which the Contracting Officer considers unreasonable and the Contracting Officer is unable to obtain a satisfactory solution after exhausting the courses of action set forth in 41 CFR 1-3.801-2(c), the matter shall be referred to the Head of the Procuring Activity, with a statement of facts and the Contracting Officer's recommendations, for resolution.

§ 44-3.802 Preparation for negotiation.

§ 44-3.802-2 Alternate procedures for consideration of late proposals.

When the Head of the Procuring Activity determines that the procedures set forth in 41 CFR 1-3.802-1 are not appropriate for certain classes of negotiated procurement conducted by FEMA, he may authorize the adoption of the procedures set forth in 41 CFR 1-3.802-2(b) for consideration of late proposals and modifications (except where the procurement of general purpose automated data processing equipment is involved unless use of the procedures set forth in 41 CFR 1-3.802-2(b) is expressly authorized by the Commissioner, automated Data and Telecommunications Service, GSA).

§ 44-3.805 Selection of offerors for negotiation and award.

§ 44-3.805-50 Source selection procedures.

All competitive procurements in excess of $10,000 shall be subject to a formal selection procedure as described herein.

(a) A proposal evaluation team shall be appointed for each competitive procurement. For procurements under $500,000, the team shall be called the Technical Evaluation Panel. For those procurements in excess of $500,000, the team shall be called the Source Evaluation Board.

(b) Each competitive solicitation shall contain applicable selection criteria including the numerical ranking of each selecting official for those procurements under $500,000 shall be the Contracting Officer and for those over $500,000 the head of the cognizant program office shall be the selecting official.

(c) The proposal evaluation team shall evaluate each proposal against the criteria established in the request for proposal. The initial evaluation shall be to determine technical merit and then shall be combined with the business evaluation to determine the overall merit. Upon completion of this total evaluation the competitive range shall be established. The competitive range shall include those proposals which through written or oral discussions with the offeror, have a reasonable change of selection when all factors are considered, including cost. The competitive range shall be established by the Source Evaluation Board for procurements in excess of $500,000 and by the Contracting Officer on those under $500,000.

(d) Discussions shall be conducted with all offerors in the competitive range. Each offeror shall be given an opportunity to submit a revised proposal. A common cutoff date shall be established for receipt of the revisions. Upon receipt the appropriate evaluation team shall evaluate and prepare a final ranking. A final recommendation report will be prepared and furnished to the selecting official. The selecting official for those procurements under $500,000 shall be the Contracting Officer and for those over $500,000 the head of the cognizant program office shall be the selecting official.

(e) The selecting official shall consider the recommendations and select the firm(s) for final negotiations. The Contracting Officer shall then enter into final negotiations with the selected firm(s) to resolve all remaining terms and conditions necessary to reach final agreement.

Subpart 3.51—Protests Against Award

§ 44-3.5101 Negotiated procurement protests.

Protests against award of neogtiated contracts shall be processed in accordance with FEMAPR 44-2.407-8 and 41 CFR 1-2.407-8.

PART 44-4—SPECIAL TYPES AND METHODS OF PROCUREMENT

Sec.

44-4.000 Scope and applicability of part.

Subpart 4.9—Unsolicited Proposals

44-4.900 Scope of subpart.
44-4.901 General.
44-4.902 Policy.
44-4.903 Program direction and operation.
44-4.904 Definitions.
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44-4.911 Prohibitions.
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Subpart 4.10—Architect-Engineer Services

44-4.1000 Scope of subpart.
44-4.1004 Selection.
44-4.1004-1 Establishment of architect-engineer evaluation boards.
44-4.1004-4 Source selection.
44-4.1004-50 Conflict of interest.
44-4.1004.51 Privity of information.

Subpart 4.11—Procurement and Contracting for Government-Wide Automated Data Processing Equipment, Software, Maintenance Services, and Supplies

44-4.1100 Scope of subpart.
44-4.1104 Request for procurement action.
44-4.1104-50 Clearance procedures.

Subpart 4.50—Interagency Procurement [Reserved]

Sec.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); Reorganization Plan No. 3 of 1978, 43 FR 41943.

SOURCE: 45 FR 55359, Aug. 19, 1980, unless otherwise noted.

§ 44-4.000 Scope and applicability of part.

This part sets forth policies and procedures regarding unsolicited proposals and the procurement of architect-engineer services, automatic data processing equipment and services, and property and services from other Federal agencies.

Subpart 4.9—Unsolicited Proposals

§ 44-4.900 Scope of subpart.

This subpart sets forth policies and procedures concerning the receipt, evaluation, and acceptance of unsolicited proposals.

§ 44-4.901 General.

The unsolicited proposal is a valuable means by which unique or innovative methods or approaches which have originated or developed outside the Government can be made available to FEMA for use in its mission. It is offered in the hope that FEMA will enter into a contract with the offeror for (a) research on or development of the methods, approaches, or ideas it contains, or (b) the conduct of the activity or services or delivery of the items it proposes. It should not be merely an advance proposal for a specific FEMA requirement which would normally be procured by competitive methods. An unsolicited proposal should be prepared independent of Government supervision. As it often represents a substantial investment of time and effort by the offeror, it should present the proposed work in sufficient detail to allow a determination that FEMA support could be worthwhile and that the proposed work could enhance, benefit, and/or provide valuable input to FEMA's research and development mission or to some other area of this Agency's responsibility.

§ 44-4.902 Policy.

FEMA fosters and encourages the submission of unsolicited proposals which contribute new ideas consistent with the contributing to the accomplishment of this Agency's objectives.

§ 44-4.903 Program direction and operation.

For detailed information on unsolicited proposals see §§ 44-4.905 and 44-4.908 of this part.

§ 44-4.904 Definitions.

As used in this subpart, the following terms have the meanings stated.

(a) "Unsolicited proposal" means a written offer to perform a proposed task or effort, initiated and submitted to FEMA by a prospective contractor (offeror) without a solicitation by FEMA, with the objective of obtaining a contract. Advertising materials, commercial product offerings, contributions, or technical correspondence as defined in paragraphs (b) through (e) of this section which are submitted to this Agency shall not be considered to constitute unsolicited proposals within the intent of this subpart.

(b) "Advertising material" means material designed to acquaint FEMA with a prospective contractor's present off-the-shelf products or potential capabilities, or designed to determine this Agency's interest in buying such products.

(c) "Commercial product offerings" means offers of standard commercial products usually sold in substantial quantities to the general public and which the vendor wishes to see introduced in the FEMA supply system as an alternate or replacement for an existing supply item.

(d) "Contributions" means concepts, suggestions, or merely ideas presented to FEMA for its use, with no indication on the part of the offeror that he will devote any further effort in relation to such concepts, suggestions, or ideas on behalf of this Agency.

(e) "Technical correspondence" includes written inquiries regarding FEMA interest in research areas, preproposal explorations, technical inquiries, and research descriptions.

§ 44-4.905 Advance guidance.

Organizations or individuals who are interested in submitting an unsolicited proposal are encouraged, before expending extensive effort in preparing a detailed unsolicited proposal or submitting any proprietary information to FEMA, to make preliminary inquiries as to the general need for the type of effort contemplated.

(a) Prior contact with FEMA technical personnel is permissible and encouraged with the limited objective of conveying to the prospective offeror an understanding of the FEMA mission and needs relative to the type of effort contemplated.

(b) The following information regarding policy and procedures for unsolicited proposals is furnished for the use of potential offerors.

(1) Definition—See § 44-4.904(a) of this part.

(2) Characteristics of a suitable proposal acceptable for formal evaluation. See §§ 44-4.906 and 44-4.910 of this part.

(3) Prospective offerors are advised that:

(i) Any awards, based upon acceptance of unsolicited proposals, shall be made only to responsible prospective contracts who meet the standards set forth in 41 CFR 1-1.1203-1 and 1-1.1203-2 and such special standards as may be prescribed in 1-1.2303-3.

(ii) In the areas of research, this Agency's choice of a contractor shall be based primarily upon getting the job done effectively and efficiently with due regard to the long-term strength of the Nation's scientific and technical resources, and avoiding assignments of work which would create inherent conflicts of interest.

(iii) FEMA's Appropriation Act includes provisions requiring cost sharing by the contractor under research contracts resulting from unsolicited proposals. This requirement may only be waived when (A) the offeror certifies in writing to the Contracting Officer that it has no commercial, production, educational or service activities on which to use the results of the research and that it has no means of recovering any costs sharing on such projects; and (B) the Contracting Officer makes a written determination that there is no measurable gain to the performing organization and no mutuality of interest; therefore, it would not be equitable for the Government to require cost sharing.

(4) Prospective offerors, prior to investing substantial time and money in preparation of an unsolicited proposal, should correspond with Agency technical personnel as to the general need for the type of effort to be offered. (See §§ 44-4.904(e) and 44-4.905(a), and 44-4.908 of this part.)

(5) The FEMA point of contact for information regarding unsolicited proposals and other types of transactions frequently misconstrued as unsolicited proposals, e.g., advertising, bidders mailing lists, etc., is the Acquisition Management Division, Policy and Support Branch (See § 44-4.908 of this part).

(6) Information regarding unsolicited proposal submission procedures is contained in §§ 44-4.906 through 44-4.913 of this part.

(7) Information regarding unsolicited proposal evaluation procedures is contained in § 44-4.909 of this part.

(8) Information on FEMA objectives and areas of potential interest suitable for unsolicited proposal submissions may be obtained from this Agency's technical representatives through the Acquisition Management Division, Policy and Support Branch (See § 44-4.908 of this part).

(9) Prospective offerors should identify any proprietary information that may be contained in proposals and any restrictive legend appearing in the proposal must conform to the legend set forth in § 44-4.913(a) of this part.

(10) Unsolicited proposals shall conform to the procedural and submission guidelines contained in §§ 44-4.906 through 44-4.913 of this part.

(c) All FEMA personnel shall conduct personal contacts in a manner that will preclude FEMA commitments regarding acceptability of unsolicited proposals.

§ 44-4.906 Content of unsolicited proposals.

Unsolicited proposals shall contain the following information in order to

permit consideration in an orderly and timely manner.

(a) *Basic information.* Name and address of offeror; if an organization, indicate type; e.g., profit, nonprofit, educational, small business, names and telephone numbers of the offerors technical and business personnel whom FEMA may contact for evaluation and negotiation purposes; identification of any proprietary data which the offeror intends to be used by FEMA only for evaluation purposes (See § 44-4.913 of this part), names of any other Federal, States, local agencies or other parties receiving the proposal and/or funding the proposed effort or activity; date of submission; and signature of a responsible official or authorized representative of the organization or a person authorized to contractually obligate the organization.

(b) *Technical information.* A concise title and an abstract (approximately 200 words) of the proposed effort; a reasonably complete discussion stating the objectives of the effort, the method of approach and extent of effort to be employed, the nature and extent of the anticipated results, and the manner in which the work will help support accomplishment of the FEMA mission; the names and brief biographical information of the offerors key personnel who would be involved and the types of support if any, the offeror requests of FEMA, e.g., facilities, equipment, materials, or personnel resources.

(c) *Supporting information.* A proposed price or total estimated cost; a cost estimate for the proposed effort sufficiently detailed by element of cost for meaningful evaluation; the type of contract preferred; period of time for which the proposal is valid (a minimum of 6 months is suggested); proposed duration of effort, statements, if applicable, regarding cost sharing, organizational conflicts of interests, security clearance status, and environmental impacts; and brief descriptions of the organization, previous work or experience in the field of the proposal, and facilities to be utilized for the work, where appropriate for understanding the proposal.

§ 44-4.907 Submission.

Unsolicited proposals shall be submitted in an original and five copies at least six months in advance of the offeror's desired beginning of the proposed effort in order to allow this Agency sufficient time to evaluate the proposal and negotiate any resultant contract.

§ 44-4.908 Agency point of contact.

The Acquisition Management Division is the FEMA point of contact for the receipt, acknowledgement and handling of unsolicited proposals. Unsolicited proposals and requests for additional information regarding their preparation shall be submitted to:

Federal Emergency Management Agency, Acquisition Management Division, Policy & Support Branch (M Street Building), Washington, D.C. 20472.

Unsolicited proposals received by other FEMA offices shall be immediately furnished to the Acquisition Management Division, Policy & Support Branch.

§ 44-4.909 Receipt, review, and evaluation.

(a) The Acquisition Management Division shall acknowledge an unsolicited proposal within ten (10) days of its receipt. Simultaneously, copies of the proposal shall be sent to the appropriate program office(s) for evaluation.

(b) Prior to having a comprehensive evaluation made on any unsolicited proposal, the Acquisition Management Division shall insure that the proposal:

(1) Contains sufficient technical and cost information to permit a meaningful evaluation; and

(2) Has been approved by a responsible official of the offeror's organization or a person authorized to contractually obligate the organization.

(c) If the unsolicited proposal does not meet the requirements in (b) of this section, the Acquisition Management Division shall give the offeror the opportunity to provide the required data. A comprehensive evaluation of an unsolicited proposal shall not be made if the proposal is not within the purview of the mission of FEMA. In such cases the offeror shall

be advised how the proposal is being interpreted, the reason(s) for not evaluating it, and the disposition of the material submitted. An appropriately revised or supplemented proposal which is responsive to the above may be reconsidered.

(d) For each unsolicited proposal that is circulated for a comprehensive evaluation within FEMA, the Acquisition Management Division shall attach a legend identifying it as an unsolicited proposal, and stating that it shall be used only for the purpose of evaluation (See § 44-4.913(c) of this part). In evaluating unsolicited proposals, program officials shall consider, in addition to any other criteria, the following:

(1) Unique, innovative or meritorious methods, approaches, or ideas which originated with or are assembled together by the offeror that are contained in the proposed effort or activity.

(2) Overall scientific, technical, or socioeconomic merits of the proposed effort or activity.

(3) Potential contribution which the proposed effort is expected to make to the FEMA mission, if pursued at this time.

(4) Capabilities, related experience, facilities, or techniques, or unique combinations thereof which the offeror possesses and offers and which are considered to be integral factors for achieving the scientific, technical, or socioeconomic objective(s) of the proposal.

(5) Qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel who are considered to be critical in achieving the objectives of the proposal.

(e) Upon completion of the comprehensive evaluation, program officials shall notify the Acquisition Management Division of their conclusions together with recommendations for further action.

§ 44-4.910 Method of procurement.

(a) A favorable comprehensive evaluation of an unsolicited proposal is not, in itself, sufficient justification for negotiating on a noncompetitive basis with the offeror. When a document qualifies as an unsolicited proposal but the substance is available to the Government without restriction from another source, or closely resembles that of a pending requirement that will result in a competitive solicitation, or is otherwise not sufficiently unique to justify acceptance, the unsolicited proposal shall not be accepted and shall be returned to the offeror by the Acquisition Management Division with reasons for the return.

(b) A noncompetitive procurement is permissible when an unsolicited proposal has received a favorable technical evaluation, unless FEMA has determined that the substance thereof is available to the Government without restriction from another source, or a competitive procurement is otherwise appropriate. The program office sponsoring the procurement shall support its recommendation with a justification for a noncompetitive procurement. The justification shall be based on a comprehensive evaluation of the proposal and shall include the facts and circumstances that operate to preclude competition and that support the recommended noncompetitive action. Consideration shall include the evaluation factors listed in § 44-4.909(d) of this part.

(c) When it is determined that the subject matter of an unsolicited proposal is acceptable for award on a noncompetitive basis, the unsolicited proposal will serve as the basis for negotiation.

§ 44-4.911 Prohibitions.

No unsolicited proposal nor any part of an unsolicited proposal shall be used as the basis, or as a portion, of a solicitation, or in negotiation with other firms unless the offeror is notified of and agrees to the intended use. However, FEMA may use any data, concept, or idea which it could have used had the unsolicited proposal not been submitted. Unauthorized disclosure of data tendered in an unsolicited proposal (see § 44-4.913(a) of this part) which concerns or relates to trade secrets, processes, operations, style of work, or apparatus, or other matters may result in the imposition of a

criminal penalty pursuant to the provisions of 18 U.S.C. 1905.

§ 44-4.912 Interagency coordination.

When it is determined that a meritorious unsolicited proposal is not related to the mission of FEMA or may be of interest to other agencies in addition to this Agency, FEMA may identify for the offeror other agencies whose missions bear a relationship to the subject matter of the unsolicited proposal.

§ 44-4.913 Limited use of data.

(a) An unsolicited proposal may include data which the offeror does not want disclosed for any purpose other than evaluation of the proposal. If the offeror wishes to impose such a restriction on his unsolicited proposal the offeror shall mark the title page with the following legend:

USE AND DISCLOSURE OF DATA

This data shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part for any purpose other than to evaluate the proposal, PROVIDED, That if a contract is awarded to this offeror as a result of or in connection with the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the contract. This restriction does not limit the Government's right to use information contained in the data if it is obtainable from another source without restriction. The data subject to this restriction is contained in Sheets ——.

The offeror also shall mark each sheet which the offeror wishes to restrict with the following legend:

Use of disclosure of proposal data is subject to the restriction on the title page of this proposal.

(b) If an unsolicited proposal is marked with a legend substantially different from that provided in (a) of this section, the Acquisition Management Division shall return the proposal to the offeror advising the offeror that the proposal cannot be considered because it is impracticable for the Government to comply with the legend. However, the offeror shall also be advised that the proposal will be considered if it is resubmitted with the legend provided in (a) of this section.

(c) Except as provided in paragraphs (d) or (e) of this section, the Acquisition Management Division shall place a cover sheet on the proposal or the proposal shall be otherwise clearly marked as follows unless the offeror gives a clear written indication that it does not wish to impose any restrictions on the disclosure or use of the data contained in the proposal.

UNSOLICITED PROPOSAL

Use of Data Limited

All Government personnel handling this proposal shall exercise EXTREME CARE to insure that the information contained herein is not disclosed outside the Government and is NOT DUPLICATED, USED, OR DISCLOSED in whole or in part for any purpose other than to evaluate the proposal, without the written permission of the offeror (except that if a contract is awarded on the basis of this proposal, the terms of the contract shall control disclosure and use).

This notice does not limit the Government's right to use information contained in the proposal if it is obtainable from another source without restriction.

This is a Government notice, and shall not by itself be construed to impose any liability upon the Government or Government personnel for any disclosure or use of data contained in this proposal.

The notice in this paragraph (c) is used by FEMA solely as a manner of handling unsolicited proposals which will be compatible with the provisions of this section. Nevertheless, the use of the notice in this paragraph (c) shall not be used by FEMA to justify the withholding of a document (record) nor to improperly deny access to a document to an individual (the public) where an obligation is imposed on FEMA by the Freedom of Information Act, 5 U.S.C. 552, as amended. Matters which the prospective offeror considers to be trade secrets and commercial or financial information and privileged or confidential should be identified by the offeror upon submission to FEMA in accordance with (a) of this section.

(d) If an unsolicited proposal is received without any restrictive legend from an educational or nonprofit organization or institution and it is necessary or appropriate to obtain an evalu-

ation outside the Government, the Acquisition Management Division shall place a cover sheet on the proposal or shall clearly mark the proposal with the legend set forth in (c) of this section, modified by changing the first two words to read "All Government and Non-Government," and by deleting the words "is not disclosed outside the Government and." The Acquisition Management Division shall obtain from any non-Government evaluator a written agreement that the evaluator will not disclose information in the proposal outside the Government. If the proposal is received with the restrictive legend specified in (a) of this section, the modified cover shall also be used and permission shall be obtained from the offeror, prior to release, for the release of the proposal for outside evaluation.

(e) If an unsolicited proposal is received from other than an education or nonprofit organization or institution irrespective of whether it contains a restrictive legend, and it is necessary or appropriate to obtain an evaluation of the proposal by Government personnel outside of FEMA and/or outside the Government, written permission shall be obtained from the offeror prior to release of the proposal for such evaluation. The Acquisition Management Division shall place a cover sheet on the proposal or shall clearly mark the proposal with the legend set forth in (c) of this section, if appropriate. The Acquisition Management Division shall obtain from any non-Government evaluator a written agreement that the evaluator will not disclose information in the proposal outside the Government.

Subpart 4.10—Architect-Engineer Services

§ 44-4.1000 Scope of subpart.

This subpart sets forth policies and procedures for the establishment of architect-engineer evaluation boards and for architect-engineer source selection.

§ 44-4.1004 Selection.

§ 44-4.1004-1 Establishment of architect-engineer evaluation boards.

Each architect-engineer evaluation board, whether permanent or ad hoc, shall consist of at least five voting members who are Federal employees from the appropriate FEMA program office or, from Federal offices outside the program office, as appropriate. One member of each board shall be appointed chairman. Five alternate members, who are Federal employees, shall also be appointed. The majority of voting members shall be from the program office concerned. The members of a permanent board shall be appointed by the Director for a period of two (2) years.

§ 44-4.1004-4 Source selection.

(a) The heads of offices cognizant over programs which from time to time may require architect-engineer services are designated as source selection officials for all procurements of architect-engineer services, and as such are vested with the authority to review the recommendations of the evaluation board and to make the final selection of the firms best qualified to perform the work, in accordance with the provisions of 41 CFR 1-4.1004-4. Rejections of the recommended firms and the reasons for their rejection will be in writing.

(b) Upon the determination of the qualified firms by the source selection official, a requisition shall be forwarded to the procuring office which shall indicate the order of qualification, including capability, of the selected firms. The procuring office shall then send a request for proposal to, and begin negotiations with, the firm ranked highest on the list.

§ 44-4.1004-50 Conflict of interest.

If at any time during the selection process a board member or advisor to the board, encounters a situation with one or more of the firms being considered that might be, or might appear to be, a conflict of interest, he will disqualify himself and call it to the attention of the chairman who shall refer

the matter to the Office of General Counsel.

§ 44-4.1004-51 Privity of information.

The evaluation board is to be insulated from outside pressures to the extent practical. No person having knowledge of the activities of the board shall divulge information concerning the deliberations of the board to any other persons not having a need to know such information.

Subpart 4.11—Procurement and Contracting for Government-Wide Automated Data Processing Equipment, Software, Maintenance Service, and Supplies

§ 44-4.1100 Scope of subpart.

This subpart sets forth policy governing the procurement of all automatic data processing equipment, software, maintenance services, and supplies by FEMA.

§ 44-4.1104 Request for procurement action.

§ 44-4.1104-50 Clearance procedures.

No solicitation or modification to an existing contract, when related in whole or in part to the procurement of ADP equipment or services, shall be issued until approval is obtained from the General Services Administration pursuant to 41 CFR 1-4.1104.

Subpart 4.50—Interagency Procurement [Reserved]

PART 44-7—CONTRACT CLAUSES

Sec.

44-7.000 Scope of part

Subpart 7.50—Additional clauses.

44-7.5001 Additional clauses to be used in all contracts.
44-7.5001-1 Notification of changes.
44-7.5001-2 Suspension of work.
44-7.5001-3 Affirmative action for disabled veterans and veterans of the Vietnam era.
44-7.5002 Additional clauses to be used in contracts as appropriate.
44-7.5002-1 Rights in technical data and computer software.
44-7.5002-2 Reproduction of reports.
44-7.5002-3 Coordination of Federal reporting requirements.
44-7.5002-4 Services of consultants.
44-7.5002-5 Publication.
44-7.5002-6 Indirect costs (actual).
44-7.5002-7—44-7.5002-8 [Reserved]
44-7.5002-9 Consideration and payment (cost-sharing).
44-7.5002-10 Warranty.
44-7.5002-11 [Reserved]
44-7.5002-12 Method of payment—letter of credit.
44-7.5002-13 Cost Accounting Standard Withdrawal.
44-7.5002-14 Rights in Technical Data—Specific Acquisition.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); Reorganization Plan No. 3 of 1978, 43 FR 41943.

SOURCE: 45 FR 55363, Aug. 19, 1980, unless otherwise noted.

§ 44-7.000 Scope of part.

This part sets forth special contract clauses which are in addition to clauses set forth in the FPR for use in connection with the procurement of personal property and nonpersonal services (including construction).

Subpart 7.50—Additional Clauses

§ 44-7.5001 Additional clauses to be used in all contracts.

§ 44-7.5001-1 Notification of changes.

NOTIFICATION OF CHANGES

(a) *Notices.* The Contractor shall notify the Contracting Officer within five (5) calendar days of receipt of any instruction which he/she considers to be a change to the contract terms and conditions. Instructions to be reported can include actions, inactions and written or oral communications but need not include written communication from the Contracting Officer specifically directing changes. Notice from the Contractor shall state:

(1) The date, nature, and circumstance of the instructions regarded as a change;

(2) The name, function, and activity of each Government individual and Contractor employee involved in or knowledgeable about such instructions; and

(3) The identification of any documents and the substance of any oral communication involved in such instruction.

(b) *Continued Performance.* Following submission of the notice required by (a) of this provision the Contractor shall continue

performance of this contract in accordance with its terms and conditions as understood prior to receipt of said instruction. The Contractor shall *not* institute a change to the terms and conditions of the contract until specifically authorized by the Contracting Officer, in writing, to do so.

(c) *Contractor's Liability.* If the Contractor proceeds with any change to the terms and conditions of the contract without prior written approval from the Contracting Officer, the Contractor assumes all liability for costs incurred by such action.

§ 44-7.5001-2 Suspension of work.

SUSPENSION OF WORK

(a) The Contracting Officer may, at any time, by written order to the contractor, require the contractor to suspend, delay or interrupt all, or any part, of the work called for by this contract for a period up to ninety (90) days after the order is delivered to the contractor, and for any further period to which the parties may agree. Any such order shall be specifically identified as a suspension of work issued pursuant to this clause. Upon receipt of such an order, the contractor shall forthwith comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work suspension. Within a period of ninety (90) days after a suspension of work order is delivered to the contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either:

(1) Cancel the suspension of work order; or

(2) Terminate the work covered by such order as provided in the "Termination for Convenience" clause of this contract.

(b) If a suspension of work issued under this clause is cancelled or the period of the order or any extension thereof expires, the contractor shall resume work. An equitable adjustment shall be made in the delivery schedule or contract price, or both, and the contract shall be modified in writing accordingly, if:

(1) The suspension of work results in an increase in the time required for, or in the contractor's cost properly allocable to, the performance of any part of this contract, and

(2) The contractor asserts a claim for such adjustment within thirty (30) days after the end of the period of work stoppage; provided, that, if the Contracting Officer decides the facts justify such action, he may receive and act upon any such claim asserted at any time prior to final payment under this contract.

Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause of this contract.

(c) If a suspension of work order is not cancelled and the work covered by such order is terminated for the convenience of the Government, the reasonable costs resulting from the suspension of work order shall be allowed in arriving at the termination settlement.

(d) If a suspension of work order is not cancelled and the work covered by such order is terminated for default, the reasonable costs resulting from the suspension of work order shall be allowed by equitable adjustment or otherwise.

§ 44-7.5001-3 Affirmative action for disabled veterans and veterans of the Vietnam era.

AFFIRMATIVE ACTION FOR DISABLED VETERANS AND VETERANS OF THE VIETNAM ERA

(a) The contractor will not discriminate against any employee or applicant for employment because he or she is a disabled veteran or veterans of the Vietnam era in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment, and otherwise treat qualified disabled veterans and veterans of the Vietnam era without discrimination based upon their disability or veterans status in all employment practices such as the following: employment upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(b) The contractor agrees that all suitable employment openings of the contractor which exist at the time of the execution of this contract and those which occur during the performance of this contract, including those not generated by this contract and including those occurring at an establishment of the contractor other than the one wherein the contract is being performed but excluding those of independently operated corporate affiliates, shall be listed at an appropriate local office of the State employment service system wherein the opening occurs. The contractor further agrees to provide such reports to such local office regarding employment openings and hires as may be required.

State and local government agencies holding Federal contracts of $10,000 or more shall also list all their suitable openings with the appropriate office of the State employment service, but are not required to provide those reports set forth in paragraphs (d) and (e).

(c) Listing of employment openings with the employment service system pursuant to this clause shall be made at least concurrently with the use of any other recruitment source or effort and shall involve the normal obligations which attach to the placings of a bona fide job order, including the acceptance of referrals of veterans and nonveterans. The listing of employment openings does not require the hiring of any particular job applicant or from any particular group of job applicants, and nothing herein is intended to relieve the contractor from any requirements in Executive orders or regulations regarding nondiscrimination in employment.

(d) The reports required by paragraph (b) of this order shall include, but not be limited to periodic reports which shall be filed at least quarterly with the appropriate local office or, where the contractor has more than one hiring location in a State, with the central office of that State employment service. Such reports shall indicate for each hiring location (1) the number of individuals hired during the reporting period, (2) the number of nondisabled veterans of Vietnam era hired, (3) the number of disabled veterans of the Vietnam era hired, and (4) the total number of disabled veterans hired. The reports should include covered veterans hired for on-the-job training under 38 U.S.C. 1787. The contractor shall submit a report within 30 days after the end of each reporting period wherein any performance is made on this contract identifying data for each hiring location. The contractor shall maintain at each hiring location copies of the reports submitted until the expiration of one year after final payment under the contract, during which time these reports and related documentation shall be made available, upon request, for examination by any authorized representatives of the Contracting Officer or of the Secretary of Labor. Documentation would include personnel records respecting job openings, recruitment, and placement.

(e) Whenever the contractor becomes contractually bound to the listing provisions of this clause, it shall advise the employment service system in each State where it has establishments of the name and location of each hiring location in the State. As long as the contractor is contractually bound to these provisions and has so advised the State system, there is no need to advise the State system of subsequent contracts. The contractor may advise the State system when it is no longer bound by this contract clause.

(f) This clause does not apply to the listing of employment openings which occur and are filled outside the 50 States, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

(g) The provisions of paragraphs (b), (c), (d), and (e) of this clause do not apply to openings which the contractor proposes to fill from within his own organization or to fill pursuant to a customary and traditional employer-union hiring arrangement. This exclusion does not apply to a particular opening once an employer decides to consider applicants outside of his own organization or employer-union arrangement for that opening.

(h) As used in this clause:

(1) "All suitable employment openings" includes, but is not limited to, openings which occur in the following job categories: production and non-production; plant and office; laborers and mechanics; supervisory and nonsupervisory; technical; and executive, administrative, and professional openings that are compensated on a salary basis of less than $25,000 per year. This term includes full-time employment, temporary employment of more than 3 days' duration, and part-time employment. It does not include openings which the contractor proposes to fill from within his own organization or to fill pursuant to a customary and traditional employer-union hiring arrangement nor openings in an educational institution which are restricted to students of that institution. Under the most compelling circumstances an employment opening may not be suitable for listing, including such situations where the needs of the Government cannot reasonably be otherwise supplied, where listing would be contrary to national security, or where the requirement of listing would otherwise not be in the best interest of the Government.

(2) "Appropriate office of the State employment service system" means the local office of the Federal/State national system of public employment offices with assigned responsibility for serving the area where the employment opening is to be filled, including the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

(3) "Openings which the contractor proposes to fill from within his own organization" means employment openings for which no consideration will be given to persons outside the contractor's organization (including any affiliates, subsidiaries, and the parent companies) and includes any openings which the contractor proposes to fill from regularly established "recall" lists.

(4) "Openings which the contractor proposes to fill pursuant to a customary and traditional employer-union hiring arrangement" means employment openings which the contractor proposes to fill from union halls, which is part of the customary and traditional hiring relationship which exists between the contractor and representatives of his employees.

(i) The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(j) In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(k) The contractor agrees to post in conspicuous places available to employees and applicants for employment notices in a form to be prescribed by the Director, provided by or through the Contracting Officer. Such notice shall state the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era for employment, and the rights of applicants and employees.

(l) The contractor will notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding that the contractor is bound by terms of the Vietnam Era Veteran's Readjustment Assistance Act and is committed to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era.

(m) The contractor will include the provisions of this clause in every subcontract or purchase order of $10,000 or more unless exempted by rules, regulations, or orders of the Secretary issued pursuant to the Act, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director of the Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

§ 44-7.5002 Additional clauses to be used in contracts as appropriate.

§ 44-7.5002-1 Rights in technical data and computer software.

RIGHTS IN DATA

(a) Definitions. (1) Technical Data means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental or engineering work; or be usable or used to define a design or process or to procure, produce, support, maintain, or operate materiel. The data may be graphic or pictorial delineations in media such as drawings or photographs; text in specifications or related performance or design type documents; or computer printouts. Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications standards, process sheets, manuals, technical reports, catalog item identifications and related information and computer software documentation. Technical data does not include computer software or financial, administrative, cost and pricing, and management data or other information incidental to contract administration.

(2) Computer—a data processing device capable of accepting data, performing prescribed operations on the data, and suppling the results of these operations; for example, a device that operates on discrete data by performing arithmetic and logic processes on these data, or a device that operates on analog data by performing physical processes on the data.

(3) Computer Software—computer programs and computer data bases

(4) Computer Program—a series of instructions or statements in a form acceptable to a computer, designed to cause the computer to execute an operation or operations. Computer programs include operating systems, assemblers, compilers, interpreters, data management systems, utility programs, sort-merge programs, and ADPE maintenance/diagnostic programs, as well as applications programs such as payroll, inventory control, and engineering analysis programs. Computer programs may be either machine-dependent or machine-independent, and may be general-purpose in nature or designed to satisfy the requirements of a particular user.

(5) Computer Data Base—a collection of data in a form capable of being processed and operated on by a computer.

(6) Computer Software Documentation—Technical data, including computer listing and printouts, in human-readable form which (i) documents the design or details of computer software, (ii) explains the capabilities of the software, or (iii) provides operating instructions for using the software to obtain desired results from a computer.

(7) Unlimited Rights means rights to use, duplicate, or disclose technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(8) Limited Rights means rights to use, duplicate, or disclose technical data, in whole or in part, by or for the Government, with the express limitation that such technical data shall not, without the written permission of the party furnishing such technical data be (a) released or disclosed in whole or in part outside the Government, (b) used in whole or in part by the Government for manufacture, or in the case of computer software documentation, for preparing the same or similar computer soft-

ware, or (c) used by a party other than the Government, except for:

(i) emergency repair or overhaul work only, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, provided that the release or disclosure thereof outside the Government shall be made subject to a prohibition against further use, release of disclosure; or

(ii) release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of (i) above.

(9) Restricted Rights apply only to computer software, and include, as a minimum, the right to:

(i) use computer software with the computer for which or with which it was acquired, including use at any Government installation to which the computer may be transferred by the Government;

(ii) use computer software with a backup computer if the computer for which or with which it was acquired is inoperative;

(iii) copy computer programs for safekeeping (archives) or backup purposes;

(iv) modify computer software, or combine it with other software, subject to the provision that those portions of the derivative software incorporating restricted rights software are subject to the same restricted rights; and

(v) treat computer software bearing a copyright notice as a published copyrighted work; and in addition, any other specific rights not inconsistent therewith listed or described in this contract or described in a license or agreement made a part of this contract.

(b) Government Rights. (1) Unlimited Rights. The Government shall have unlimited rights in:

(i) technical data and computer software resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contact or subcontact;

(ii) computer software required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract;

(iii) computer data bases, prepared under a Government contract, consisting of information supplied by the Government, information in which the Government has unlimited rights, or information which is in the public domain;

(iv) technical data necessary to enable manufacture of end-items, components and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, developed under this or any other Government contract or subcontract in which experimental, developmental or research work is, or was specified as an element of contract performance, except technical data pertaining to items, components, processes, or computer software developed at private expense (but see (2)(ii) below);

(v) technical data or computer software prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished data or computer software;

(vi) technical data pertaining to end-items; components or processes, prepared or required to be delivered under this or any other Government contract or subcontract, for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements ("form, fit and function" data, e.g., specification control drawings, catalog sheets, envelope drawings, etc.);

(vii) manuals or instructional materials prepared or required to be delivered under this contract or any subcontract hereunder for installation, operation, maintenance or training purposes;

(viii) technical data or computer software which is in the public domain, or has been or is normally furnished without restriction by the Contractor or subcontractor; and

(ix) technical data or computer software listed or described in an agreement incorporated into the schedule of this contract which the parties have predetermined, on the basis or subparagraphs (i) through (viii) above, and agreed will be furnished with unlimited rights.

(2) Limited Rights. The Government shall have limited rights in:

(i) technical data, listed or described in an agreement incorporated into the Schedule of this contract, which the parties have agreed will be furnished with limited rights; and

(ii) technical data pertaining to items, components or processes developed at private expense, and computer software documentation related to computer software that is acquired with restricted rights, other than such data as may be included in the data referred to in (b)(1)(i), (v), (viii), and (viii); provided that only the portion or portions of each piece of data to which limited rights are to be asserted pursuant to (2) (i) and (ii) above are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below in which is inserted:

A. the number of the prime contract under which the technical data is to be delivered,

B. the name of the Contractor and any subcontractor by whom the technical data was generated, and

C. an explanation of the method used to identify limited rights data.

LIMITED RIGHTS LEGEND

Contract No. ———————————
Contractor: ———————————
Explanation of Limited Rights Identification Method Used
———————————
———————————

Those portions of this technical data indicated as limited rights data shall not, without the written permission of the above Contractor, be either (a) used, released or disclosed in whole or in part outside the Government, (b) used in whole or in part by the Government for manufacture or, in the case of computer software documenation, for preparing the same or similar computer software, or (c) used by a party other than the Government, except for: (i) emergency repair or overhaul work only, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, provided that the release or disclosure hereof outside the Government shall be made subject to a prohibition against further use, release or disclosure; or (ii) release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of (i) above. This legend, together with the indications of the portions of this data which are subject to such limitations shall be included on any reproduction hereof which includes any part of the portions subject to such limitations.

(3) Restricted Rights. The Government shall have restricted rights in computer software, listed or described in a license or agreement made a part of this contract, which the parties have agreed will be furnished with restricted rights, provided, however, notwithstanding any contrary provision in any such license or agreement, the Government shall have the rights in (a)(9)(i) through (v). Such restricted rights are of no effect unless the computer software is marked by the Contractor with the following legend:

RESTRICTED RIGHTS LEGEND

Use, duplication or disclosure is subject to restrictions stated in Contract No. ——— with ——— (Name of Contractor) ———.

and the related computer software documentation includes a prominent statement of the restrictions applicable to the computer software. The Contractor may not place any legend on computer software indicating restrictions on the Government's rights in such software unless the restrictions are set forth in a license or agreement made a part of this contract prior to the delivery date of the software. Failure of the Contractor to apply a restricted rights legend to such computer software shall relieve the Government of liability with respect to such unmarked software.

(4) No legend shall be marked on, nor shall any limitation or restriction on rights of use be asserted as to, any data or computer software which the Contractor has previously delivered to the Government without restriction. The limited or restricted rights provided for by this paragraph shall not impair the right of the Government to use similar or identical data or computer software acquired from other sources.

(c) Material Covered by Copyright. (1) In addition to the rights granted under the provisions of (b) above, the Contractor agrees to and does hereby grant to the Government a royalty-free, nonexclusive and irrevocable license throughout the world for Government purposes to publish, translate, reproduce, deliver, perform, dispose of, and to authorize others so to do, all technical data, except computer software documentation bearing a copyright notice and furnished in support of restricted rights computer software, and unlimited rights computer software prepared or required to be delivered under the contract, now or hereafter covered by copyright.

(2) Copyrighted matter shall not be included in technical data furnished hereunder without the written permission of the copyright owner for the Government to use such copyright matter in the manner described in (c)(1) above, unless the written approval of the Contracting Officer is obtained.

(3) The Contractor shall report to the Government (or higher-tier Contractor) promptly and in reasonable written detail each notice or claim of copyright infringement received by the Contractor with respect to any technical data or computer software delivered hereunder.

(d) Removal of Unauthorized Markings. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may correct, cancel, or ignore any marking not authorized by the terms of this contract on any technical data or computer software furnished hereunder, if:

(i) the Contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the markings, or

(ii) the Contractor's response fails to substantiate, within sixty (60) days after written notice, the propriety of limited rights markings by clear and convincing evidence,

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or of restricted rights markings by identification of the restrictions set forth in the contract.

In either case the Government shall give written notice to the Contractor of the action taken.

(e) Relation to Patents. Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(f) Limitation on Charges for Data and Computer Software. The Contractor recognizes that the Government or a foreign government with funds derived through the Military Assistance Program or otherwise through the United States Government may contract for property or services with respect to which the vendor may be liable to the Contractor for charges for the use of technical data or computer software on account of such a contract. The Contractor further recognizes that it is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for data or computer software which the Government has a right to use and disclose to others, which is in the public domain, or which the Government has been given without restrictions upon its use and disclosure to others. This policy does not apply to reasonable reproduction, handling, mailing, and similar administrative costs incident to the furnishing of such data or computer software. In recognition of this policy, the Contractor agrees to participate in and make appropriate arrangements for the exclusion of such charges from such contracts, or for the refund or amounts received by the Contractor with respect to any such charges not so excluded.

(g) Acquisition of Data and Computer Software from Subcontractors. (1) Whenever any technical data or computer software is to be obtained from a subcontractor under this contract, the Contractor shall use this same clause in the subcontract, without alteration, and no other clause shall be used to enlarge or diminish the Government's or the Contractor's rights in that subcontractor data or computer software which is required for the Government.

(2) Technical data required to be delivered by a subcontractor shall normally be delivered to the next-higher tier Contractor. However, when there is a requirement in the prime contract for data which may be submitted with limited rights pursuant to (b)(2) above, a subcontractor may fulfill such requirement by submitting such data directly to the Government rather than through the prime Contractor.

(3) The Contractor and higher-tier subcontractors will not use their power to award subcontracts as economic leverage to acquire rights in technical data-or computer software from their subcontractors for themselves.

§ 44-7.5002-2 Reproduction of reports.

Include the following clause when the product of the contract is a report, data or other written material.

REPRODUCTION OF REPORTS

Reproduction of reports, data or other written material, if required herein is authorized provided that the material produced does not exceed 5,000 production units of any page and that items consisting of multiple pages do not exceed 25,000 production units in aggregate. The aggregate number of production units is to be determined by multiplying pages times copies. A production unit is one sheet, size 8½ by 11 inches or less, printed on one size only and in one color. All copy preparation to produce camera ready copy for reproduction must be set by methods other than hot metal typesetting. The reports should be produced by methods employing stencils masters and plates which are to be used on single unit duplicating equipment no larger than 11 by 17 inches with a maximum image of 10¾ by 14¼ inches and are prepared by methods or devices that do not utilize reusable contact negatives and/or positives prepared with a camera requiring a darkroom. All reproducibles (camera ready copies for reproduction by photo offset methods) shall become the property of the Government and shall be delivered to the Government with the report, data or other written material.

§ 44-7.5002-3 Coordination of Federal reporting requirements.

The following clause shall be included in contracts when appropriate:

COORDINATION OF FEDERAL REPORTING SERVICES

In the event that it is a contractual requirement to collect information from ten or more public respondents, the provisions of 44 U.S.C., Chapter 35 (Coordination of Federal Reporting Requirements), shall apply to this contract. The contractor shall obtain through the Project Officer the required Office of Management and Budget clearance before making public contacts for the collection of data or expending any funds for such collection. The authority to proceed with the collection of data from public respondents and the expenditure of

funds therefor shall be in writing signed by the Contracting Officer.

§ 44-7.5002-4 Services of consultants.

The following clause shall be used in contracts where it is anticipated that consultant services may be used:

SERVICES OF CONSULTANTS

Except as otherwise expressly provided elsewhere in this contract, and notwithstanding the provisions of the clause of this contract entitled, "Subcontracting" the prior written approval of the Contracting Officer shall be required:

(a) Whenever any employee of the contractor is to be reimbursed as a "consultant" under this contract; and

(b) For the utilization of the services of any consultant under this contract except when the consultant has been identified and rates established during negotiations of this contract.

Whenever Contracting Officer approval is required, the contractor shall obtain and furnish to the Contracting Officer information concerning the need of such consultant services and the reasonableness of the fees to be paid, including, but not limited to, whether fees to be paid to any consultant exceed the lowest fee charged by such consultant to others for performing consultant services of a similar nature.

§ 44-7.5002-5 Publication.

The following clause shall be used in all contracts under which it is anticipated that a report will be a product:

PUBLICATION

(a) *Definition.* For the purpose of this clause, "publication" includes (1) any document containing information intended for public consumption or (2) the act of, or any act which may result in disclosing information to the public.

(b) *General.* The results of the research and development and studies conducted under this contract are to be made available to the public through dedication, assignment to the Government, or such other means as the Director of the Federal Emergency Management Agency shall determine.

(c) *Reports furnished the Government.* All intermediate and final reports of the research and development and studies conducted hereunder shall indicate on the cover or other initial page that the research and development and studies forming the basis for the report were conducted pursuant to a contract with the Federal Emergency Management Agency. Such reports are official Government property and may not be published or reproduced (in toto, in verbatim excerpt, or in a form approximating either of these) as an unofficial paper or article. The contractor or technical personnel (each employee or consultant working under the administrative direction of the contractor or any subcontractor hereunder) may publish such reports in whole or in part in a non-Government publication only in accordance with this paragraph (c) and paragraph (e) (1) of this clause.

(d) *Publication by Government.* The Government shall have full right to publish all information, data, and findings developed as a result of the research and development and studies conducted hereunder.

(e) *Publication by contractor or technical personnel.* (1) *Publication in whole or in part of contractor's reports furnished the Government.* Unless such reports have been placed in the public domain by Government publication, the contractor or technical personnel (each employee or consultant working under the administrative direction of the contractor or any subcontractor hereunder) may publish a report furnished the Government, in toto or in verbatim excerpt, but consistent with paragraph (c) of this clause may not secure copyright therein, subject to the following conditions, and the conditions in paragraph (e)(4) and paragraph (f):

(i) During the first six months after submission of the full final report, if written permission to publish is obtained from the Contracting Officer.

(ii) After six months following submission of the full final report, and if paragraph (e)(3) is inapplicable, if a foreword or footnote in the non-Government publication indicates the source of the verbatim material.

(2) *Publication, except verbatim excerpts, concerning or based in whole or in part on results of research and development and studies hereunder.* The contractor or technical personnel may issue a publication concerning, or based in whole or in part on the results of, the research and development and studies conducted under this contract and may secure copyright therein but in so publishing is not authorized thereby to inhibit the unrestricted right of the Director of the Federal Emergency Management Agency to disclose or publish in such manner as he may deem to be in the public interest the results of such research and development and studies, subject to the following conditions and the requirement in paragraph (e)(4):

(i) During the first six months after submission of the full final report, and if paragraph (e)(3) is inapplicable, if written waiver of the waiting period is obtained from the Contracting Officer.

(ii) After six months following submission of the full final report, and if paragraph (e)(3) is inapplicable, subject to Government exercise of an option that the publica-

tion contain a foreword or initial footnote substantially as follows:

The (research) (development) (studies) forming (part of) the basis for this publication were conducted pursuant to a contract with the Federal Emergency Management Agency. The substance of such (research) (development) (studies) is dedicated to the public. The author and publisher are solely responsible for the accuracy of statements or interpretations contained herein.

(3) *General condition if FEMA determines that contractor's final report contains patentable subject matter developed in contract performance.* If the Contracting Officer determines that the contractor's full final report contains patentable subject matter developed in the performance of this contract and so notifies the contractor in writing prior to six months from date of submission of such report, no publication of verbatim excerpts from contractor's reports or publication concerning or based in whole or in part on the results of the research and development and studies hereunder shall be made without the written consent of the Contracting Officer.

(4) *Copies of contractor and technical personnel publications to be furnished the Government.* The contractor or technical personnel will furnish the Contracting Officer six (6) copies of any publications which are based in whole or in part on the research and development and studies conducted under this contract.

(f) *Administratively confidential information.* The contractor shall not publish or otherwise disclose, except to the Government and except matters of public record, any information or data obtained hereunder from private individuals, organizations, or public agencies, in a publication whereby the information or data furnished by any particular person or establishment can be identified, except with the consent of such person or establishment.

(g) *Inclusion of provisions in contractor's agreements.* The contractor shall include provisions appropriate to effectuate the purposes of this clause in all contracts of employment with persons who perform any part of the research or development or study under this contract and in any consultant's agreements or subcontracts involving research or development or study hereunder.

§ 44-7.5002-6 Indirect costs (actual).

When it has been determined pursuant to FEMAPR 44-3.702(c) that it is not appropriate to include the Negotiated Overhead Rates clause set forth in 41 CFR 1-3.704, the following clause shall be inserted:

INDIRECT COSTS (ACTUAL))

In accordance with the "Allowable Cost, Fixed-Fee, and Payment" clause of the contract, the contractor shall be paid his actual overhead cost. Allowable overhead cost will be determined by the Contracting Officer in accordance with the principles set forth in 41 CFR Part 1-15. Any failure of the parties hereto to agree as to what constitutes actual overhead costs shall be considered a dispute covering a question of fact within the meaning of the clause of this contract entitled "Disputes".

§§ 44-7.5002-7—44-7.5002-8 [Reserved]

§ 44-7.5002-9 Consideration and payment (cost-sharing).

The following clause shall be inserted in each cost-sharing contract:

CONSIDERATION AND PAYMENT (COST-SHARING)

(a) The estimated cost for the performance of this contract is $———. The contractor agrees to bear without reimbursement by the Government —% of the cost for performance hereunder. Such cost sharing shall be effected as set forth in Paragraph (b) below.

(b) Public vouchers or invoices shall be submitted in an original and five (5) copies and shall show the total cost incurred for the period for which the voucher or invoice is submitted, the cumulative total of costs incurred through the billing period, and the percentage of costs to be reimbursed by the Government. However, the Government is not obligated to reimburse the contractor in excess of ———% of such amount. The Government shall not be obligated to reimburse the contractor for the Government's share of the costs in excess of $——— nor is the contractor obligated by this contract to expend his own funds in excess of $———.

§ 44-7.5002-10 Warranty.

When it has been determined that it is appropriate to place a warranty on equipment or services furnished under a contract, insert the following clause set forth below. Each construction contract shall incorporate an appropriate clause.

WARRANTY

The contractor agrees that the supplies or services furnished by the contractor under this contract shall be covered by warranties which are either standard or customary in the trade or are substantially similar to, and not in excess of, a standard or customary

trade warranty. The contractor shall furnish any warranty description at time of delivery. Supply package shall be simply marked to show existence of the warranty, its expiration date and the company official to be notified.

§ 44-7.5002-11 [Reserved]

§ 44-7.5002-12 Methods of payment—Letter of Credit.

(a) The contractor shall be paid with funds made available under the Federal Reserve Letter of Credit No. ———, established by ———, Federal Emergency Management Agency (FEMA), against which the contractor will withdraw funds pursuant to prescribed Federal Reserve Letter of Credit procedures, as implemented by FEMA.

(b) The contractor shall: (1) initiate cash drawdowns only when actually needed for its disbursements, (2) timely report cash disbursements and balances as required by the Contracting Officer, and (3) impose the same standards of timing and amount upon any secondary recipients including the furnishing of reports of cash disbursements and balances. Failure to adhere to these material provisions will be considered an event under paragraph (f) of this clause.

(c) The funds drawn by the contractor against the Federal Reserve Letter of credit referred to above shall be only for current allowable expenditures necessary for the performance of the contract.

(d) Then so requested in writing by the Contracting Officer, the contractor shall repay to the government, in accordance with prescribed agency procedures, such part in the unliquidated balance of the advance payments as shall, in the opinion of the Contracting Officer, be in excess of the contractor's current needs or in excess of the contract price.

(e) If upon completion or termination of this contract all amounts obtained by the contractor under this letter of credit shall have not been fully liquidated by authorized charges under the contract, the balance thereof shall be deducted from any sums otherwise due to the contractor from the Government, and any excess funds shall be repaid by the contractor to the Government.

(f) Upon the happening of any of the following events of default: (1) a finding by the Contracting Officer that the contractor (i) has failed to observe any of the convenants, conditions, or warranties of these provisions or has failed to comply with any material provision of this contract, or (ii) has so failed to make progress, or is in such unsatisfactory financial condition, as to endanger performance of this contract, or (iii) has allocated inventory to this contract substantially exceeding reasonable requirements, or (iv) is delinquent in payment of taxes or of the costs of performance of this contract in the ordinary course of business; (2) appointment of a trustee, receiver or liquidator for all or a substantial part of the contractor's property, or institution of bankruptcy, reorganization, arrangement or liquidation proceedings, by or against the contractor; (3) service of any writ of attachment, levy of execution, or commencement of garnishment proceedings; or (4) the commission of an act of bankrutcy; the Government, without limiting any rights which it may otherwise have may, in its discretion and upon written notice to the contractor withhold further withdrawals under the Letter of Credit and withhold further payments on this contract.

(g) Upon the continuance of any such events of default for a period of thirty (30) days after such written notice to the contractor, the Government may, in its discretion, and without limiting any other rights which the Government may have, take the following additional actions as it may deem appropriate in the circumstances:

(1) Charge interest on advance payments outstanding during the period of any such default at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41, 85 Stat. 97 for the Renegotiation Board:

(2) Demand immediate repayment of the unliquidated balance of advance payments hereunder; or

(3) Take possession of and, with or without advertisements, sell at public sale at which the Government may be the purchaser, or at a private sale, all or any part of the property on which the Government has a lien under this contract and, after deducting any expenses incident to such sale, apply the net proceeds of such sale in reduction of the unliquidated balance of advance payments hereunder and in reduction of any other claims of the Government against the contractor.

(h) Notwithstanding any other provision of this contract, the contractor shall not transfer, pledge, or otherwise assign this contract, or any interest therein, or any claim arising thereunder, to any party or parties, bank, trust company, or other financing institution.

(i)(1) Interest shall be charged in the manner provided herein at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41: 85 Stat. 97, for the Renegotiation Board on subadvances or downpayments to subcontractors, and such interest will be credited to the account of the Government. However, interest need not be charged on subadvances on subcontracts with nonprofit educational or research institutions for experimental, developmental or research work.

(2) The office administering advance payments is designated as the Acquisition Management Division.

(j) For the performance of this contract, the Government shall pay the contractor: The cost thereof (hereinafter referred to as "allowable cost" determined by the Contracting Officer to be allowable in accordance with (1) 41 CFR 1-15 as in effect on the date of this contract; and (2) the terms of this contract.

(k) For the purpose of determining amounts to be advanced under this contract, costs previously incurred shall only include those recorded costs which result, at the time of requests for further advances, from payment by cash, check, or other form of actual payment for items or services purchased directly for the contract, together with (when the contractor is not delinquent in payment of costs of contract performance in the ordinary course of business) costs incurred, but not necessarily paid for materials which have been issued from the contractor's stores inventory and production process for use on the contract, for direct labor, for direct travel, for other direct in-house costs, and for properly allocable and allowable indirect costs, as is shown by records maintained by the contractor for purposes of obtaining reimbursement under Government contracts plus the amount of progress payments which have been paid to the Contractor's subcontractors under similar cost standards. In addition, when pension contributions are paid by the contractor to the retirement fund less frequently than quarterly, accrued costs therefor shall be excluded from indirect costs for purposes of obtaining advances under this contract until such costs are paid. If pension contributions are paid on a quarterly or more frequent basis, accruals therefor may be included in indirect costs for payment purposes provided that they are paid to the fund within 30 days after the close of the period covered. If payments are not made to the fund within such 30-day period, pension contribution costs shall be excluded from indirect cost for payment purposes of obtaining advances under this contract until payment has been made.

(l) The contractor shall submit an invoice or a voucher designated as a "Completion Invoice" or "Completion Voucher" promptly following completion of the work under this contract but in no event later than one year (or such longer time as the Contracting Officer may in his discretion approve in writing) from the date of such completion. The Contracting Officer can direct that a final report of expenditures be included with the completion invoice or voucher.

(m) The contractor agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the contractor or any assignee under this contract shall be paid by the contractor to the Government, to the extent that they are properly allocable to costs for which the contractor has been reimbursed by the Government under this contract. Reasonable expenses incurred by the contractor for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable costs hereunder when approved by the Contracting Officer. Prior to final payment under this contract, the contractor shall execute and deliver:

(1) An assignment to the Government, in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including any interest thereon) properly allowable to costs for which the contractor has been reimbursed by the Government under this contract; and

(2) A release discharging the government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract subject only to the following exceptions:

(i) Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible to exact statements by the contractor;

(ii) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the contractor to third parties arising out of the performance of this contract; provided, however, that such claims are not known to the contractor on the date of the execution of the release, and provided further, that the contractor gives notice of such claims in writing to the Contracting Officer not more than six years after the date of the release or the date of any notice to the contractor that the Government is prepared to make final payment, whichever is earlier; and

(iii) Claims for reimbursement of costs (other than expenses of the contractor by reason of its indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the contractor under the provisions of this contract relating to patents.

(n) Any cost incurred by the contractor under the terms of this contract which would constitute allowable cost under the provisions of this clause shall be included in determining the amount payable under this contract, notwithstanding any provisions contained in the specifications or other documents incorporated in this contract by references, designating services to be performed or materials to be furnished by the contractor at his expense or without cost to the Government.

§ 44-7.5002-13 Cost Accounting Standard Withdrawal.

Cost Accounting Standard 414—Cost of money as an element of cost of facilities capital—is withdrawn from application to the provisions of the clauses in this contract entitled "Cost Accounting Standards" and "Administration of Cost Accounting Standards."

§ 44-7.5002-14 Rights in Technical Data—Specific Acquisition.

(a) Definition. Technical Data means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental or engineering work; or be usable or used to define a design or process or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs; text in specifications or related performance or design type documents; or computer printouts. Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalogs item identifications, and related information, and documentation related to computer software. Technical data does not include computer software or financial, administrative, cost and pricing, and management data, or other information incidental to contract administration.

(b) Government Rights. The Government may duplicate, use and disclose in any manner and for any purpose whatsoever, and have others so do, all or any part of the technical data delivered by the Contractor to the Government under this contract.

(c) Material Covered by Copyright. (1) In addition to the rights granted under the provisions of (b) above, the Contractor agrees to and does hereby grant to the Government a royalty-free, nonexclusive and irrevocable license throughout the world for Government purposes to publish, translate, reproduce, deliver, perform, dispose of, and to authorize others so to do, all technical data, required to be delivered under the contract, now or hereafter covered by copyright.

(2) Copyrighted matter shall not be included in technical data furnished hereunder without the written permission of the copyright owner for the Government to use such copyrighted matter in the manner described in (c)(1) above, unless the written approval of the Contracting Officer is obtained.

(3) The Contractor shall report to the Government (or higher-tier Contractor) promptly and in reasonable written detail each notice or claim of copyright infringement received by the Contractor with respect to any technical data delivered hereunder.

(d) Relation to Patents. Nothing contained in this clause shall imply a license to the Government under any patent, or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(e) Limitation on Charges for Data. The Contractor recognizes that the Government, or a foreign government with funds derived through the Military Assistance Program or otherwise through the United States Government, may contract for property or services with respect to which the vendor may be liable to the Contractor for charges for the use of technical data on account of such a contract. The Contractor further recognizes that it is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for data which the Government has a right to use and disclose to others which is in the public domain, which the Government has been given without restrictions upon its use and disclosure to others. This policy does not apply to reasonable reproduction, handling, mailing, and similar administrative costs incident to the furnishing of such data. In recognition of this policy, the Contractor agrees to participate in and make appropriate arrangements for the exclusion of such charges from such contracts, or for the refund of amounts received by the Contractor with respect to any such charges not so excluded.

PART 44-11—FEDERAL, STATE, AND LOCAL TAXES

Sec.

§ 44-11.000 Scope of part.

Subpart 11.4—Contract Clauses

§ 44-11.401-4 Matters requiring special consideration.

Subpart 11.50—Resolution of Tax Problems

§ 44-11.500-1 Resolution of tax problems.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); Reorganization Plan No. 3 of 1978, 43 FR 41943.

SOURCE: 45 FR 55369, Aug. 19, 1980, unless otherwise noted.

§ 44-11.000 Scope of part.

This part sets forth policies and procedures for dealing with matters concerning Federal, State or local taxes.

Subpart 11.4—Contract Clauses

§ 44-11.401-4 Matters requiring special consideration.

Pursuant to 41 CFR 1-11.401-4(d), it is the policy of FEMA to implement the procedures set forth in 41 CFR 1-11.404-4 (a), (b), and (c) as appropriate.

Subpart 11.50—Resolution of Tax Problems

§ 44-11.500-1 Resolution of tax problems.

In order to have uniformity in FEMA's treatment of the tax aspects of a contract and to insure effective cooperation with other Government agencies on tax matters of mutual interest, the Office of General Counsel has the responsibility within FEMA for handling all tax problems. Therefore, procuring offices will not engage in negotiation with any taxing authority for the purpose of determining the validity or applicability of, or obtaining exemptions from or refund of, any tax. When a problem exists, the Contracting Officer shall request in writing the assistance of the Office of General Counsel. The request shall detail the problem and be accompanied by appropriate backup data. The Office of General Counsel shall report to the Contracting Officer as to the necessary disposition of the tax problem. The Contracting Officer will notify the contractor of the outcome of the tax problem. The Office of General Counsel shall have the responsibility for communications with the Department of Justice for representation or intervention in proceedings concerning taxes.

PART 44-13—GOVERNMENT PROPERTY

Sec.

44-13.000 Scope of part.
44-13.001 General policy.

Subpart 13.1—Definitions

Sec.

44-13.100 Scope of subpart.
44-13.101 Government property.
44-13.102 Real property.
44-13.103 Personal property.
44-13.104 Facilities.

Subpart 13.2—Furnishing Government Property to Contractors

44-13.201 Responsibility of FEMA.
44-13.202 Availability of required property.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); Reorganizaion Plan No. 3 of 1978, 43 FR 41943.

SOURCE: 45 FR 55369, Aug. 19, 1980, unless otherwise noted.

§ 44-13.000 Scope of part.

This part sets forth policy concerning the furnishing of Government property to contractors under FEMA contracts.

§ 44-13.001 General policy.

It is the general policy of FEMA to contract with suppliers which are able to perform the requirements of a contract without being furnished property by the Government. This policy has been established to prevent FEMA from assuming any responsibility for the performance of work under a contract which rightly vests in the contractor, and to preclude the possibility of creating an unfair competitive advantage for one prospective contractor over another. However, circumstances may arise in which the interests of the Government would be best served by furnishing property to contractors, such as in a case where the property is necessary to contract performance, or, when furnishing Government property will result in substantial cost savings to the Government.

Subpart 13.1—Definitions

§ 44-13.100 Scope of subpart.

For purposes of this part, and unless otherwise indicated, the following terms have the meaning set forth in this subpart.

§ 44-13.101 Government property.

"Government property" means all property furnished by the Government or acquired with Federal funds by the contractor for use in performance of his contractual obligations. Government property includes Government-furnished property and contractor-acquired property as defined below:

(a) "Government-furnished property" is property in the possession of, or acquired directly by, the Government and subsequently delivered or otherwise made available to the contractor; and

(b) "Contractor-acquired property" is property procured or otherwise provided by the contractor for the performance of a contract, title to which is vested in the Government.

§ 44-13.102 Real property.

"Real Property" means land, buildings or items permanently affixed to either land or buildings.

§ 44-13.103 Personal property.

"Personal property" means all property that is subject to ownership except real property. Personal property includes:

(a) *Reportable property.* All property other than real property having a unit acquisition cost of $100.00 or more and tools regardless of cost.

(b) *Expendable property (material).* Property which may be incorporated into, or attached to, an end item to be delivered under the contract or which may be consumed or expended in the performance of the contract.

It is the general policy of FEMA that contractors will furnish all materials required for the performance of its contracts. However, furnishing materials to contractors could be preferable when:

(1) The material is not readily available on the market or cannot be conveniently manufactured by a contractor or his subcontractors. This premise is valid only if the Government has the material in inventory or can readily obtain it;

(2) The cost would be less than if the contractor obtained the material;

(3) The Government may already be exercising control over the material;

(4) Standardization or Government-design control is desired;

(5) It is necessary to expedite the research; and

(6) Furnishing the material may significantly broaden the competitive base.

(c) *Residual materials and property.* All serviceable material not consumed in the performance of a contract, and all unserviceable or scrap equipment not consumed in the performance of a contract.

§ 44-13.104 Facilities.

"Facilities" means all industrial property (other than material, special tooling, military or space property, special test equipment and technical information) used for the production, maintenance, research, development, or test, including real property and rights therein, buildings, structures, improvements, and plant equipment.

Subpart 13.2—Furnishing Government Property to Contractors

§ 44-13.201 Responsibility of FEMA.

When the Government furnishes property it assumes a direct role in the performance of the contract. Therefore, the furnishing of Government property should be carefully planned and scheduled in order to avoid delays or mistakes. When Government-furnished property is essential for performance of the contract, FEMA must insure that the contractor receives the property in the specified quantities and at the required time.

§ 44-13.202 Availability of required property.

(a) Prior to making a decision to furnish property to a prospective contractor, the Contracting Officer shall first ascertain whether the subject property is available by inquiring into existing inventories. Property requested should be identified by functional need in order to maximize the effectiveness of furnishing Government property. The functions to which the Government furnished property are to be applied should be analyzed to de-

termine what types of equipment can be used from available sources.

(b) When existing Government property is not available or suitable, the contractor may be authorized (subject to surveillance and approval of the Contracting Officer) to purchase new property. The contractor then vouchers for the property along with the normal billing process, is reimbursed and the Government takes title to the property. Contractor-acquired and Government furnished property can be combined in the same contract.

PART 44-15—CONTRACT COST PRINCIPLES AND PROCEDURES

Sec.

44-15.000 Scope of part.

Subpart 15.50—Suspension and Disallowance of Contract Costs

44-15.5000 Scope of subpart.
44-15.5001 Suspension and disallowance of costs.
44-15.5001-1 Procedure.
44-15.5001-2 Recourse to determination of cost as unallowable.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); Reorganization Plan No. 3 of 1978, 43 FR 41943.

SOURCE: 45 FR 55370, Aug. 19, 1980, unless otherwise noted.

§ 44-15.000 Scope of part.

This part sets forth policies and procedures concerning unallowable costs.

Subpart 15.50 Suspension and Disallowance of Contract Costs

§ 44-15.5000 Scope of subpart.

This subpart sets forth policies and procedures concerning suspension and disallowance of contract costs and recourse to determination of costs as unallowable.

§ 44-15.5001 Suspension and disallowance of costs.

§ 44-15.5001-1 Procedure.

In the event that the contractor presents a cost for reimbursement which the Contracting Officer considers to be unallowable, questionably allowable or partially unallowable, either specifically pursuant to 41 CFR 1-15, or consistent with the intent thereof, he shall notify the Division of Budget and Finance, the Project Officer, and the contractor that the subject cost, plus any corresponding overhead, general and administrative expense, indirect cost or fee associated with its incurrence, is being suspended pending receipt of supporting documentation from the contractor justifying the cost. This notification in each case shall be in writing and shall be accompanied by a copy of the invoice indicating the questioned cost. The notification to the contractor shall also indicate that supporting documentation for the cost must be received within thirty days, or such longer period as may be granted by the Contracting Officer, or the cost will be disallowed pending final audit. The notification to the Division of Budget and Finance shall also indicate that the cost and associated pool costs and/or fee should not be reimbursed. If the contractor provides the requested documentation, and the Contracting Officer considers it to adequately support the cost as allowable, the Contracting Officer shall so notify the contractor and advise him to resubmit the cost and associated pool costs on his next invoice clearly indicating the origin and identity of the cost. In the event that the contractor should fail to submit the requested documentation, or if the supporting documentation is considered to be inadequate, or does not support the cost as allowable, the Contracting Officer shall notify the contractor, in writing, to this effect and advise him that the cost is being disallowed and, therefore, shall not be reimbursed.

§ 44-15.5001-2 Recourse to determination of cost as unallowable.

When the Contracting Officer has determined, in accordance with the foregoing procedure, that a cost is unallowable, his decision shall be final and conclusive unless the contractor seeks remedy pursuant to the "Disputes" clause of the contract.

PART 44-16—PROCUREMENT FORMS

Sec.

44-16.000 Scope of part.

Subpart 16.1—Forms for Advertised Supply Contracts

44-16.101 Contract forms.

Subpart 16.2—Forms for Negotiated Supply Contracts

44-16.202 Contracts forms.
44-16.202-50 Fixed price contracts.
44-16.202-51 Cost-reimbursement contracts.

Subpart 16.3—Purchase and Delivery Order Forms

44-16.301 Order-invoice-voucher forms.
44-16.301-2 Order for supplies or services (Standard Forms 147 and 148).

Subpart 16.5—Forms for Advertised and Negotiated Nonpersonal Service Contracts (Other Than Construction and Architect Engineer Contracts)

44-16.501 Contracts forms.
44-16-501-1 Fixed price contracts.
44-16.501-2 Cost-reimbursement contracts.

Subpart 16.7—Forms for Negotiated Architect-Engineer Contracts

44-16.701 Forms prescribed.
44-16.701-1 Cost-reimbursement contracts.

Subpart 16.8—Miscellaneous Forms

44-16.806 Contract pricing proposals.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); Reorganization Plan No. 3 of 1978, 43 FR 41943.

SOURCE: 45 FR 55371, Aug. 19, 1980, unless otherwise noted.

§ 44-16.000 Scope of part.

This part precribes forms for use by FEMA procuring offices in connection with the procurement of supplies, purchase and delivery orders, nonpersonal services, and architect-engineer services and other miscellaneous forms for use in connection with the procurement of supplies and services.

Subpart 16.1—Forms for Advertised Supply Contracts

§ 44-16.101 Contract forms.

FEMA Form 40-8 shall be used for all advertised supply contracts in excess of $10,000.

Subpart 16.2—Forms for Negotiated Supply Contracts

§ 44-16.202 Contract forms.

§ 44-16.202-50 Fixed price contracts.

FEMA Form 40-8 shall be used for all negotiated fixed price supply contracts in excess of $10,000.

§ 44-16.202-51 Cost-reimbursement contracts.

FEMA Form 40-7 shall be used for all cost-reimbursement supply contracts in excess of $10,000.

Subpart 16.3—Purchase and Delivery Order Forms

§ 44-16.301 Order-invoice-voucher forms.

§ 44-16.301-2 Order for supplies or services (standard form 147 and 148).

All FEMA purchase and delivery orders shall be executed on Standard Form 147 (SF-147), "Order for Supplies or Services", and Standard Form 148 (SF-148) "Continuation Sheet".

Subpart 16.5—Forms for Advertised and Negotiated Nonpersonal Service Contracts (Other Than Construction and Architect-Engineer Contracts)

§ 44-16.501 Contract forms.

§ 44-16.501-1 Fixed Price contracts.

FEMA Form 40-11 shall be used for all advertised or negotiated fixed price contracts in excess of $10,000 for nonpersonal services other than construction, architect-engineer services and transportation.

§ 44-16.501-2 Cost-reimbursement contracts.

FEMA Form 40-10 shall be used for all cost-reimbursement contracts in

excess of $10,000 for nonpersonal services other than construction, architect-engineer services or transportation.

Subpart 16.7—Forms for Negotiated Architect-Engineer Contracts

§ 44-16.701 Forms prescribed.

§ 44-16.701-1 Cost-reimbursement contracts.

FEMA Form 40-10 shall be used for all cost-reimbursement architect-engineer contracts. The form may be modified by substituting appropriate clauses from 41 CFR Part 1-16.

Subpart 16.8—Miscellaneous Forms

§ 44-16.806 Contract pricing proposals.

Cost or pricing data shall be submitted by contractors on Optional Form 59 if the proposed contract is for other than research and development work.

PART 44-30—CONTRACT FINANCING

Sec.

44-30.000 Scope of part.

Subpart 30.4—Advance Payments

44-30.400 Scope of subpart.
44-30.406 Responsibility—delegation of authority.
44-30.408-1 Use of letter of credit method of financing.
44-30.414-2 Contract provisions for advance payments.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); Reorganization Plan No. 3 of 1978, 43 FR 41943.

SOURCE: 45 FR 55371, Aug. 19, 1980, unless otherwise noted.

§ 44-30.000 Scope of part.

This part sets forth policies and procedures concerning advance payments on prime contracts.

Subpart 30.4—Advance Payments

§ 44-30.400 Scope of subpart.

This subpart covers policies and procedures concerning authority to make advance payments and the letter of credit method of financing and sets forth clauses to be used in contract where advance payment has been authorized.

§ 44-30.406 Responsibility—delegation of authority.

The responsibility and authority for making findings and determinations with respect to advance payments and in each case for approval of contract provisions for advanced payments, or for approval of terms and conditions thereof, shall be vested in the Head of the Procuring Activity. Prior to committing FEMA to the making of an advance payment, the Head of the Procuring Activity shall obtain the advice and concurrence of the Director, Division of Budget and Finance concerning such advance payment.

§ 44-30.408-1 Use of letter of credit method of financing.

Letters of credit for contracts shall be established and administered in accordance with FEMA procedures established for all Letter of Credit transactions.

§ 44-30.414-2 Contract provisions for advance payments.

The clause set forth in 41 CFR 1-30.414-2 shall be included in all contracts for which advance funding has been authorized but for which the letter of credit method of providing advance funding is not appropriate. The clause set forth in FEMAPR 44-7.5002-12 shall be included in all contracts for which advance funding has been authorized and the letter of credit method of providing such advance funding is appropriate.

Subtitle B—Other Provisions Relating to Public Contracts

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CHAPTER 50—PUBLIC CONTRACTS, DEPARTMENT OF LABOR

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NOTE: Other regulations issued by the Department of Labor appear in Titles 20 and 29.

PART 50–201—GENERAL REGULATIONS

Sec.

50–201.1 Insertion of stipulations.
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50–201.1201 Reports of contracts awarded.
50–201.1202 Complaints.
50–201.1203 Other contracts.

AUTHORITY: Sec. 4, 49 Stat. 2038; 41 U.S.C. 38. Interpret or apply sec. 6, 49 Stat. 2038, as amended; 41 U.S.C. 40, unless otherwise noted.

§ 50–201.1 Insertion of stipulations.

Except as hereinafter directed, in every contract made and entered into by an executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States, for the manufacture or furnishing of materials, supplies, articles, and equipment, the contracting officer shall cause to be inserted or incorporated by reference in such invitation or the specifications and in such contract, the following stipulations:

REPRESENTATIONS AND STIPULATIONS PURSUANT TO PUBLIC LAW 846, 74TH CONGRESS

(a) The contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

(b) All persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contract.

(c) No person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor: *Provided, however,* That the provisions of this stipulation shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs 1 or 2 of subsection (b) of section 7 of an act entitled "The Fair Labor Standards Act of 1938": *Provided, further,* That in the case of such an employer, during the life of the agreement referred to the applicable overtime rate set by the Secretary of Labor shall be paid for hours in excess of 12 in any 1 day or in excess of 56 in any 1 week and if such overtime is not paid, the employer shall be required to compensate his employees during that week at the applicable overtime rate set by the Secretary of Labor for hours in excess of 8 in any 1 day or in excess of 40 in any 1 week.

(d) No person under 16 years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in the contract.

(e) No part of the contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this paragraph.

(f) Any breach or violation of any of the foregoing representations and stipulations shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of the contract, in the

sum of $10 per day for each person under 16 years of age, or each convict laborer knowingly employed in the performance of the contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of the contract; and, in addition, the agency of the United States entering into the contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of the contract as set forth herein may be withheld from any amounts due on the contract or may be recovered in a suit brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within 1 year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

(g) The contractor shall post a copy of the stipulations in a prominent and readily accessible place at the site of the contract work and shall keep such employment records as are required in the regulations under the act available for inspection by authorized representatives of the Secretary of Labor.

(h) The contractor is not a person who is ineligible to be awarded Government contracts by virtue of sanctions imposed pursuant to the provisions of section 3 of the act.

(i) No part of the contract shall be performed and none of the materials, articles, supplies or equipment manufactured or furnished under the contract shall be manufactured or furnished by any person found by the Secretary of Labor to be ineligible to be awarded Government contracts pursuant to section 3 of the act.

(j) The foregoing stipulations shall be deemed inoperative if this contract is for a definite amount not in excess of $10,000.

[7 FR 4494, June 16, 1942, as amended at 7 FR 11086, Dec. 30, 1942; 11 FR 6238, June 8, 1946. Redesignated at 24 FR 10952, Dec. 30, 1959, and amended at 27 FR 306, Jan. 11, 1962; 27 FR 4556, May 12, 1962; 34 FR 6687, Apr. 19, 1969; 34 FR 7451, May 8, 1969]

§ 50-201.2 Statutory exemptions.

Inclusion of the stipulations enumerated in § 50-201.1 is not required in the following instances:

(a) Where the contracting officer is authorized by the express language of a statute to purchase "in the open market", or where a purchase of articles, supplies, materials or equipment, either in being or virtually so, is made without advertising for bids under circumstances bringing such purchase within the exception to the General Purchase Statute, R.S. 3709, that is, where immediate delivery is required by the public exigency.

(b) Where the contract relates to perishables, including dairy, livestock, and nursery products ("perishables" covers products subject to decay or spoilage and not products canned, salted, smoked, or otherwise preserved);

(c) Where the contract relates to agricultural or farm products processed for first sale by the original producers;

(d) Where the contract is by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof;

(e) Where the contract is with a common carrier for carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line, where published tariff rates are in effect;

(f) Where the contract is for the furnishing of service by radio, telephone, telegraph, or cable companies, subject to the Federal Communications Act of 1934 (48 Stat. 1064 as amended; 47 U.S.C. Chapter 5).

[Regs. 504, 1 FR 1626, Sept. 19, 1936, as amended at 9 FR 8347, July 22, 1944. Redesignated at 24 FR 10952, Dec. 30, 1959]

§ 50-201.101 Manufacturer or regular dealer.

(a) *Definitions.* A bidder or contractor shall be deemed to be a "manufacturer" or "regular dealer" within the meaning of the stipulation required by section 1(a) of the act and § 50-201.1(a) if he falls within one of the following categories:

(1) A manufacturer is a person who owns, operates, or maintains a factory or establishment that produces on the premises the materials, supplies, arti-

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cles, or equipment required under the contract and of the general character described by the specifications.

(2) A regular dealer is a person who owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business.

(i) A regular dealer in lumber and timber products, if a wholesale lumber dealer, may be a person who owns, operates, or maintains a place of business in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought for the account of such person and sold to the public in the usual course of business: *Provided,* That at least more than 50 percent of his business is such purchase and sale of such materials, supplies, articles, or equipment; *And provided further,* That upon all orders to manufacturers for direct shipment to the United States he agrees to insert a notice to the manufacturer to the effect that the supplies are purchased for the United States and that the manufacturer is within the terms of § 50-201.104 requiring compliance with the provisions of the Public Contracts Act.

(ii) A machine tool dealer may be a person possessing, through contract or agreement with a manufacturer, the responsibility for selling that manufacturer's products, with respect to a specific territory and who is authorized by such manufacturer to offer its products and to negotiate and conclude contracts for the furnishing thereof. *Provided,* That upon all orders to manufacturers for direct shipment to the United States he agrees to insert a notice to the manufacturer to the effect that the supplies are purchased for the United States and that the manufacturer is within the terms of § 50-201.104 requiring compliance with the provisions of the Public Contracts Act.

(iii) A regular dealer in hay, grain, feed, or straw may be a person who owns, operates, or maintains a store, warehouse, or other place of business in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought for the account of such person and sold to the public in the usual course of business, and whose principal business is such purchase and sale of such materials, supplies, articles, or equipment.

(iv) A regular dealer in raw cotton may be a person who owns, operates or maintains a store, warehouse, or other place of business in which materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought for the account of such person and sold to the public in the usual course of business, and whose principal business is such purchase and sale of such materials, supplies, articles or equipment.

(v) A regular dealer in green coffee may be a person who owns, operates or maintains a store, warehouse, or other place of business in which materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought for the account of such person and sold to the public in the usual course of business, and whose principal business is such purchase and sale of such materials, supplies, articles or equipment.

(vi) A regular dealer in petroleum may be a person who owns, operates, or maintains petroleum distribution equipment and a store, warehouse, or other place of business in which petroleum products of the general character described by the specifications and required under the contract are bought for the account of such person and sold to the public in the usual course of business, and whose principal business is such purchase and sale of such petroleum products.

(vii) A regular dealer in agricultural liming materials may be a person who owns or controls the necessary equipment customarily required for delivering agricultural liming materials to farms or for spreading such materials on fields, who has made arrangements to purchase liming materials of the general character described by the specifications and required under the

contract from a manufacturer, and who offers such material for sale to the public in the usual course of business.

(viii) A regular dealer in tea may be an importer who owns, operates, or maintains a store, warehouse, or other place of business in which materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought for the account of such person and sold to the public in the usual course of business.

(ix) A regular dealer in raw or unmanufactured cotton linters may be a person who owns, operates or maintains a store, warehouse, or other place of business in which materials, supplies, articles, or equipment of the general character described in the specifications and required under the contract are bought for the account of such person and sold to the public in the usual course of business, and whose principal business is such purchase and sale of such materials, supplies, articles, or equipment.

(x) A regular dealer in used automatic data processing equipment may be a person who owns or controls previously owned or used items, materials, supplies, articles, or equipment of the general character described in the specifications and required under the contract and who offers such items for sale to the public in the usual course of business and whose principal business is the purchase and sale of such items, materials, supplies, articles, or equipment.

(3)(i)(A) Except as hereinafter provided, every bid received from any bidder who does not fall within one of the foregoing categories shall be rejected by the contracting officer.

(B) If it is discovered after an award that the bidder did not act in good faith in representing that it was a manufacturer or regular dealer within the meaning of the stipulations as interpreted in this Chapter 50, the contracting officer, immediately upon such discovery, may exercise his/her right to terminate the contract and to make open market purchases or to enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Lack of good faith should be judged on the basis of all facts in the case.

(ii) Whenever justice and the public interest will be served, bids for a contract or class of contracts will be exempted from the foregoing requirement by the Secretary of Labor upon the request of the head of the contracting agency or department when accompanied by his finding of fact that it will be so difficult to obtain satisfactory bids for the contract or class of contracts under the stipulated restrictions, that the conduct of the Government business will be seriously impaired.

(b) *Determination of eligibility.* (1) The responsibility for applying the stated eligibility requirements in order to determine whether or not a bidder is qualified as a manufacturer or regular dealer before award rests in the first instance with the contracting agency pursuant to authority delegated by the Secretary of Labor in accordance with section 4 of the Act. (Circular Letter 8-61.) Contracting agencies shall obtain and consider all available factual evidence essential to eligibility determinations for all bidders in line for award of contracts subject to the Act.

(2) Any decision of the contracting agency is subject to review by the Department of Labor according to the procedures outlined below. The decision of the Department of Labor shall be final with respect to the procurement or procurements at issue.

(3) The Department of Labor shall give great weight to the technical knowledge and expertise of the contracting agencies and the Department of Labor shall uphold the contracting agencies' initial determinations unless the determinations are found to be arbitrary, capricious or otherwise not in accordance with the evidence presented or with the law.

(4) The Department of Labor may determine the qualifications of a bidder in the first instance in the absence of any decision by the contracting agency.

(5) The contracting agency shall investigate and determine the Walsh-Healey eligibility status of a bidder in at least the following circumstances

and shall not merely rely on the representation or affirmation of a bidder:

(i) In all cases where the bidder (or bidders) in line for contract award has not previously been awarded a contract subject to the Act by the individual procuring office and/or where a pre-award investigation or survey of such bidder's operations is otherwise made to determine the technical and production capability, plant facilities and equipment, subcontracting and labor resources of such bidder (or bidders).

(ii) In all cases where there is a protest of a bidder's eligibility; and

(iii) In all cases where a contracting officer may have reason to question a bidder's eligibility, such as where the proposed place of contract performance and shipment is other than the location of the bidder's place of business.

(6) The following procedures shall be utilized by the contracting officer in processing an eligibility case:

(i) When the contracting officer has determined that an apparently successful bidder or offeror is ineligible, the contracting officer shall promptly notify the bidder or offeror in writing that:

(A) It does not meet the eligibility requirements, and the specific reason therefor;

(B) If it wishes to protest such determination, it may submit any evidence concerning its eligibility to the contracting officer within a reasonable time as set by the contracting officer; and

(C)(*1*) If, after review of the evidence submitted by the bidder or offeror, the contracting officer does not reverse the decision, the bidder or offeror shall be notified of the contracting officer's determination and the reasons therefor. If the bidder or offeror still disagrees with the finding, the bidder's or offeror's protest, together with all pertinent evidence, will be forwarded to the Administrator of the Wage and Hour Division of the Department of Labor for a final determination, and the bidder or offeror will be so notified.

(*2*) In the case of a small business concern, all findings of ineligibility and all pertinent evidence will be forwarded to the Administrator of the Small Business Administration, whether or not the small business concern protests the determination, and the bidder or offeror shall be so notified. The Administrator of the Small Business Administration shall review the finding of the contracting officer and shall either dismiss it and certify the small business concern to be eligible for the contract award in question, or if it concurs in the finding, forward the matter to the Administrator of the Wage and Hour Division for a final determination, in which case the Small Business Administration may certify the small business concern only if the Wage and Hour Division finds the small business concern to be eligible. The Small Business Administration is bound by the regulations and interpretations of the Department of Labor in making its determinations of eligibility under the Public Contract Act.

(ii)(A) When another bidder or offeror challenges the eligibility of the apparently successful bidder or offeror prior to award, the contracting officer shall promptly notify the protestor and the apparently successful bidder or offer in writing:

(*1*) That they may submit evidence concerning the matter to the contracting officer within a reasonable time as set by the contracting officer; and

(*2*) That after review of such evidence the contracting officer will direct a preaward survey, if necessary, and reach a decision on all the evidence and notify the protestor and successful bidder of his/her finding. If either party disagrees with the finding, the contracting officer shall then forward the decision and entire record to the Administrator of the Wage and Hour Division for a final determination. However, in the case of a small business concern, the protest and all pertinent evidence will be forwarded to the Administrator of the Small Business Administration, and the procedures set forth in § 50-201.101(b)(6)(i)C)(*2*) shall be followed.

(iii)(A) If the contracting officer forwards the case to the Department of Labor for review of eligibility under the Act, award will be held in abeyance until the contracting officer receives a final determination from the

Department of Labor, unless the contracting officer finds that award should be made immediately because:

(1) The items to be procured are urgently required; or

(2) Delay of delivery or performance by failure to make the award promptly will result in substantial hardship to the Government.

(B) If the contracting officer decides to proceed with the award, the contracting officer shall give written notice of the decision to proceed to the protester, the Department of Labor and to other concerned parties.

(iv) If an award is made under paragraph (b)(6)(iii) of this section, the contracting officer shall submit to the Department of Labor documentation explaining the need for making an award prior to the receipt of a final determination from the Administrator of the Wage and Hour Division.

(v) A protest received after award, but before final completion of the contract, shall be investigated and processed under the provisions outlined in paragraph (b)(6)(ii) of this section and forwarded to the Department of Labor, and the protestor shall be so notified.

(vi) If the contract has been completed before receipt of the protest, the protester shall be notified that no action will be taken on the protest.

[43 FR 22975, May 30, 1978, as amended at 44 FR 22078, Apr. 13, 1979]

§ 50-201.102 Employees affected.

The stipulations shall be deemed applicable only to employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment required under the contract, and shall not be deemed applicable to employees performing only office or custodial work, nor to any employee employed in a bona fide executive, administrative, professional, or outside salesman capacity, as those terms are defined and delimited by the regulations (29 CFR Part 541) applicable during the period of performance of the contract under section 13(a)(1) of the Fair Labor Standards Act of 1938, as amended.

[35 FR 17782, Nov. 19, 1970]

§ 50-201.103 Overtime.

(a) Employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment used in the performance of the contract may be employed in excess of 8 hours in any one day or in excess of 40 hours in any one week: *Provided*, Such persons shall be paid for any hours in excess of such limits the overtime rate of pay which has been set therefor by the Secretary of Labor.

(b) Until otherwise set by the Secretary of Labor the rate of pay for such overtime shall be one and one-half times the basic hourly rate received by the employee. The "basic hourly rate" means an hourly rate equivalent to the rate upon which time-and-one-half overtime compensation may be computed and paid under section 7 of the Fair Labor Standards Act of 1938, as amended. The basic hourly rate may, in no case, be less than the applicable minimum wage.

(c) If in any one week or part thereof an employee is engaged in work covered by the contractor's stipulations, his overtime shall be computed after 8 hours in any one day or after 40 hours in any one week during which no single daily total of employment may be in excess of 8 hours without payment of the overtime rate.

(d) The overtime pay requirements of this section shall be deemed to be complied with in the case of any employee employed as provided in section 7(b) of the Fair Labor Standards Act of 1938, as amended, pursuant to the provisions of paragraph (1) or (2) of that section.

[7 FR 4494, June 16, 1942, as amended at 18 FR 1832, Apr. 2, 1953. Redesignated at 24 FR 10952, Dec. 30, 1959]

§ 50-201.104 Dealer as agent of undisclosed principal.

Whenever a dealer, to whom a contract within the act and regulations in this part has been awarded, causes a manufacturer to deliver directly to the Government the materials, supplies, articles, or equipment required under

the contract, such dealer will be deemed the agent of the manufacturer in executing the contract. As the principal of such agent the manufacturer will be deemed to have agreed to the stipulations contained in the contract.

[1 FR 2359, Nov. 28, 1936. Redesignated at 24 FR 10952, Dec. 30, 1959]

§ 50-201.105 Protection against unintentional employment of underage minors.

An employer shall not be deemed to have knowingly employed an underage minor in the performance of contracts subject to the Act if, during the period of the employment of such minor, the employer has on file an unexpired certificate of age issued and held pursuant to regulations issued by the Secretary of Labor under section 3(1) of the Fair Labor Standards Act of 1938 (29 CFR 1500.121), showing that such minor is at least 16 years of age.

[34 FR 6687, Apr. 19, 1969]

§ 50-201.106 Hours worked.

In determining the hours for which an employee is employed, there shall be excluded any time which is excluded by section 3(o) of the Fair Labor Standards Act of 1938, as amended, from the computation of hours worked for purposes of sections 6 and 7 of that act.

[18 FR 1832, Apr. 2, 1953. Redesignated at 24 FR 10952, Dec. 30, 1959]

§ 50-201.201 Breach of stipulations.

(a) Whenever the Department of Labor notifies the head of a contracting agency that a contractor is liable for liquidated damages by reason of a breach of stipulations as provided in section 2 of the act, there shall be withheld from any balance due under the contract such amount as may be necessary to satisfy such liability pending final disposition of the case.

(b) Whenever a final determination of a breach of stipulations is made, the Secretary of Labor will furnish to the contracting agency a copy of the findings and decision with such recommendations as will assist the contracting agency in determining whether or not the contract should be canceled for such breach.

[Regs. 504, 1 FR 1627, Sept. 19, 1936. Redesignated at 24 FR 10952, Dec. 30, 1959]

50-201.301 Agency regulations.

Each agency which prescribe additional regulations for the Administration of the Walsh-Healey Public Contracts Act and for the implementation of the regulations in this part, shall submit such regulations, directives, and orders to the Administrator of the Wage and Hour Division prior to issuance. Any such regulations may not be enforced prior to approval by the Administrator or prior to 60 days after submission if not disapproved by the Administrator. Currently existing regulations are not affected by this section, except where such regulations are not in conformity with the Walsh-Healey Public Contracts Act and the Department of Labor regulations. In such cases, agency regulations shall be appropriately revised.

[43 FR 22977, May 30, 1978]

§ 50-201.501 Records of employment.

Every contractor subject to the provisions of the act and this part shall maintain the following records of employment which shall be available for the inspection and transcription of authorized representatives of the Secretary of Labor:

(a) Name, address, sex, and occupation of each employee covered by the contract stipulations;

(b) Date of birth of each employee under 19 years of age; and if the employer has obtained a certificate of age as provided in § 50-201.105, there shall also be recorded the title and address of the office issuing such certificate, the number of the certificate, if any, the date of its issuance, and the name, address and date of birth of the minor, as the same appears on the certificate of age;

(c) Wage-and-hour records for each such employee including the rate of wages and the amount paid each pay period, the hours worked each day and each week, and the period during which each such employee was engaged on a Government contract with the number of such contract. Compliance with this paragraph shall be deemed complete if wage-and-hour rec-

ords for all employees in the plant are maintained during the period between the award of any Government contract and the date of delivery of the materials, supplies, articles, or equipment: *Provided*, That where no separate records for employees engaged on Government contracts are maintained, it shall be presumed until affirmative proof is present to the contrary that all employees in the plant, from the date of award of any such contract until the date of delivery of the materials, supplies, articles or equipment, were engaged on such Government contract;

(d) The records required by paragraphs (a), (b), and (c) of this section shall be kept on file for at least 3 years from their last date of entry;

(e) Basic employment and earnings records: All basic time and earning cards or sheets of the employer on which are entered the daily starting and stopping time of individual employees or of separate work forces, or the individual employees' daily, weekly, or pay period amounts of work accomplished (for example, units produced) when those amounts determine in whole or in part the pay period earnings or wages of those employees;

(f) Wage rate tables: All tables or schedules of the employer which provide the piece rates or other rates used in computing straight-time earnings, wages or salary, or overtime excess compensation;

(g) Work time schedules: All schedules or tables of the employer which establish the hours and days of employment of individual employees or of separate work forces;

(h) The records required by paragraphs (e), (f), and (g) of this section shall be kept on file at least 2 years from their last date of entry or their last effective date whichever is later.

OMB CONTROL NO. 1215-0017. (47 FR 145, Jan. 5, 1982)

[7 FR 7949, Oct. 7, 1942, as amended at 13 FR 5440, Sept. 17, 1948; 23 FR 2573, Apr. 18, 1958. Redesignated at 24 FR 10952, Dec. 30, 1959, and amended at 47 FR 145, Jan. 5, 1982]

§ 50-201.502 Record of injuries.

Every person who is or shall become a party to a Government contract which is subject to the provisions of the Walsh-Healey Public Contracts Act and the regulations thereunder, or who is performing or shall perform any part of such contract subject to the provisions of such Act or regulations, shall comply with the record-keeping requirements of 29 CFR Part 1904.

[36 FR 20676, Oct. 28, 1971]

§ 50-201.601 Requests for exceptions and exemptions.

(a)(1) Request for the exception or exemption of a contract or class of contracts from the inclusion or application of one or more of those stipulations required by § 50-201.1 must be made by the head of a contracting agency or department and shall be accompanied with a finding by him setting forth reasons why such inclusion or application will seriously impair the conduct of Government business.

(2) Request for the exception or exemption of a stipulation respecting minimum rates of pay and maximum hours of labor contained in an existing contract must be made jointly by the head of the contracting agency and the contractor and shall be accompanied with a joint finding by them setting forth reasons why such exception or exemption is desired.

(b) All requests for exceptions or exemptions which relate solely to safety and health standards shall be transmitted directly to the Bureau of Labor Standards, WSA, Department of Labor. All other requests for exceptions or exemptions shall be transmitted to the Office of Government Contracts Wage Standards, WSA, of the Department of Labor.

[7 FR 4767, June 26, 1942. Redesignated at 24 FR 10952, Dec. 30, 1959 and amended at 36 FR 288, Jan. 8, 1971]

§ 50-201.602 Decisions concerning exceptions and exemptions.

Decisions concerning exceptions and exemptions shall be in writing and approved by the Secretary of Labor or officer prescribed by him, originals being filed in the Department of Labor, and certified copies shall be transmitted to the department or agency originating the request, to the

Comptroller General, and to the Procurement Division of the Treasury. All such decisions shall be promulgated to all contracting agencies by the Office of Government Contracts Wage Standards, WSA, of the Department of Labor.

[36 FR 288, Jan. 8, 1971]

§ 50-201.603 Full administrative exemptions.

The following classes of contracts have been exempted from the application of § 50-201.1 pursuant to the procedure required under section 6 of the act:

(a) Contracts for public utility services including electric light and power, water, steam, and gas;

(b) Contracts for materials, supplies, articles, or equipment no part of which will be manufactured or furnished within the geographic limits of the States of the United States of America, Puerto Rico, the Virgin Islands, or the District of Columbia: In addition, the representations and stipulations required by the act and this part in any contract for materials, supplies, articles, or equipment to be manufactured or furnished in part within and in part outside such geographic limits shall not be applicable to any work performed under the contract outside such geographic limits;

(c) Contracts covering purchases against the account of a defaulting contractor where the stipulations required in this section were not included in the defaulted contract;

(d) Contracts awarded to sales' agents or publisher representatives, for the delivery of newspapers, magazines or periodicals by the publishers thereof.

[25 FR 12553, Dec. 8, 1960]

§ 50-201.604 Partial administrative exemptions.

(a) Contracts with a person who regularly buys and sells coal on his own account in lots of not less than a cargo or railroad carload, or with a person who is authorized by one or more persons engaged in mining coal to negotiate and conclude contracts for the furnishing thereof in such lots, are exempt from the requirement of section 1(a) of the act and § 50-201.1 that such person represent that he is a manufacturer or a regular dealer in coal: *Provided, however,* That all the following terms and conditions are met:

(1) That such person will notify the persons engaged in mining the coal that the purchaser thereof is the United States and that provisions of the Public Contracts Act are applicable; and

(2) That such person, apart from the liability of the mines, shall be liable for the observance in the mines of all the labor standards provided in section 1 of the act; and

(3) That such person notify the contracting agency that he will accept the contract upon the terms and conditions set forth above.

(b) Commodity exchange contracts entered into by the Commodity Credit Corporation under the Commodity Credit Corporation Charter Act (secs. 4(h), 5(d) and (f), 62 Stat. 1070 and 1072, 15 U.S.C. 714b(h), 714c(d) and (f)), section 416 of the Agricultural Act of 1949 (63 Stat. 1058, 7 U.S.C. 1431), section 103(a)(2) of the Agricultural Act of 1954 (68 Stat. 898, 7 U.S.C. 1743(a)(2), or section 303 of the Agricultural Trade Development and Assistance Act of 1954 (68 Stat. 459, 7 U.S.C. 1692), are exempt from the requirement of section 1(a) of the act and of § 50-201.1 that the Government contractor represents that he is the manufacturer of or a regular dealer in the materials, supplies, articles or equipment to be manufactured or used in the performance of the contract.

(c) A contractor who operates and maintains a place of business where he regularly engages in the business of an export merchant, and regularly buys from manufacturers and resells exclusively for export materials, supplies, articles, or equipment of the general character described by the specifications and required under a contract shall be exempt from the requirement of section 1(a) of the act and of paragraph (a) of § 50-201.1 that the contractor be a regular dealer in the materials, supplies, or equipment to be manufactured or used in the performance of the contract: *Provided, however,* The following conditions are met:

(1) That the contract is for the purchase of materials, supplies, articles, or equipment for export;

(2) [Reserved]

(3) That the export merchant will notify the persons engaged in the manufacture of the materials, supplies, articles, or equipment that the purchaser thereof is the United States and that the provisions of the Walsh-Healey Public Contracts Act are applicable; and

(4) That such export merchant, apart from the liability of the manufacturer, shall be liable for the observance of all the labor standards provided in section 1 of the act; and

(5) That the export merchant shall notify the contracting agency that he will accept the contract upon the terms and conditions set forth above.

(d) Contracts with small business defense production pools approved by the Administrator of the Small Business Administration and contracts with small business research and development pools approved by the Administrator of the Small Business Administration are exempt from the requirement in section 1(a) of the Walsh-Healey Public Contracts Act and § 50-201.1, that the contractor is a manufacturer or regular dealer in the material, supplies, articles or equipment to be manufactured or used in the performance of the contract.

(e) Contracts with a public utility for the procurement of uranium concentrates (U_3O_8), uranium hexafluoride (UF_6), or enriched uranium are exempt from the requirement of Section 1(a) of the Act and § 50-201.1 that the contractor be a manufacturer or regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract. For purposes of this exemption, a public utility is defined to be an enterprise engaged in the transmission and sale of electric power and energy and whose rates therefor are regulated under State, local, or Federal laws governing operations of public utility enterprises.

[25 FR 12553, Dec. 8, 1960, as amended at 26 FR 9203, Sept. 30, 1961; 27 FR 4556, May 12, 1962; 27 FR 9060, Sept. 12, 1962; 40 FR 57805, Dec. 12, 1975]

§ 50-201.701 Definition of "person."

Whenever used in the regulations in this part, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

[1 FR 1627, Sept. 19, 1936. Redesignated at 24 FR 10952, Dec. 30, 1959]

§ 50-201.1101 Minimum wages.

Determinations of prevailing minimum wages or changes therein will be published in the FEDERAL REGISTER, and sent to contracting officers by the Office of Government Contracts Wage Standards, WSA, of the Department of Labor.

[36 FR 288, Jan. 8, 1971]

§ 50-201.1102 Tolerance for apprentices, student-learners, and handicapped workers.

(a) Apprentices, student-learners, and workers whose earning capacity is impaired by age or physical or mental deficiencies or injuries may be employed at wages lower than the prevailing minimum wages, determined by the Secretary of Labor pursuant to section 1(b) of the Public Contracts Act, in accordance with the same standards and procedures as are prescribed for the employment of apprentices, student-learners, handicapped persons, and handicapped clients of sheltered workshops under section 14 of the Fair Labor Standards Act of 1938, and by the regulations of the Administrator of the Wage and Hour and Public Contracts Division of the Department of Labor issued thereunder (29 CFR Parts 520, 521, 524, 525, and 528).

(b) Any certificate in effect pursuant to such regulations shall constitute authorization for employment of that worker under the Public Contracts Act in accordance with the terms of the certificate, insofar as the prevailing minimum wage is concerned.

(c) The Administrator is authorized to issue certificates under the Public Contracts Act for the employment of apprentices, student-learners, handicapped persons, or handicapped clients of sheltered workshops not subject to

the Fair Labor Standards Act of 1938, or subject to different minimum rates of pay under the two acts, at appropriate rates of compensation and in accordance with the standards and procedures prescribed by the applicable regulations issued under the Fair Labor Standards Act of 1938 (29 CFR Parts 520, 521, 524, and 525).

(d) The Administrator is also authorized to withdraw, annul, or cancel such certificates in accordance with the regulations set forth in 29 CFR Parts 525 and 528.

[28 FR 9529, Aug. 30, 1963]

§ 50-201.1201 Reports of contracts awarded.

Whenever the contracting officer shall award a contract in which the stipulations required under § 50-201.1 are operative, he shall furnish the Department of Labor in quadruplicate on a form provided for this purpose the information required by such form.

[7 FR 4767, June 26, 1942. Redesignated at 24 FR 10952, Dec. 30, 1959]

§ 50-201.1202 Complaints.

Whenever any officer or employee of the United States Government or of any agency thereof has any knowledge of, or receives any complaint with respect to, a breach or violation of the stipulations required under § 50-201.1, he shall transmit such complaint according to the usual practice in his department to the Department of Labor, together with such other information as he has in his possession.

[1 FR 1627, Sept. 19, 1936. Redesignated at 24 FR 10952, Dec. 30, 1959]

§ 50-201.1203 Other contracts.

Nothing in this part shall be construed as impairing the authority possessed by any contracting agency to require labor standards in contracts not covered by this act.

[1 FR 1627, Sept. 19, 1936. Redesignated, at 24 FR 10952, Dec. 30, 1959]

PART 50-202—MINIMUM WAGE DETERMINATIONS

Subpart A—Application and Scope

Sec.
50-202.1 Application and scope.

Subpart B—Groups of Industries

50-202.2 Minimum wage in all industries except to the extent to which a higher minimum wage is provided in Subpart C.
50-202.3 Learners, student learners, apprentices, and handicapped workers.

Subpart C—Particular or Similar Industries

50-202.16 Bituminous coal industry.

CROSS REFERENCE: For regulations relative to employment of learners, see 29 CFR Part 522.

Subpart A—Application and Scope

§ 50-202.1 Application and scope.

Not less than the minimum wages prescribed in this part shall be paid to employees described in § 50-201.102 of this chapter when their work relates to contracts subject to the Walsh-Healey Public Contracts Act. The minimum wages prescribed in this part shall apply to all contracts bids for which are solicited or negotiations otherwise commenced on or after the effective date of the applicable determination. Nothing in this part shall affect any obligations for the payment of minimum wages that an employer may have under any law or agreement more favorable to employees than than the requirements of this part.

(Secs. 1, 4, 49 Stat. 2036, 2038; 41 U.S.C. 35, 38)

[26 FR 9043, Sept. 26, 1961]

Subpart B—Groups of Industries

§ 50-202.2 Minimum wages in all industries except to the extent to which a higher minimum wage is provided in Subpart C.

In all industries, except to the extent to which a higher minimum wage is provided in Subpart C, the minimum wage applicable to employees described in § 50-201.102 of this chapter shall be not less than $2.65

per hour commencing January 1, 1978, $2.90 per hour commencing January 1, 1979, $3.10 per hour commencing January 1, 1980 and $3.35 per hour commencing January 1, 1981. As all minimum wages in Subpart C are less than $2.90 per hour, Subpart C is rescinded as of January 1, 1979.

(41 U.S.C. 43a)

[43 FR 28495, June 30, 1978]

§ 50-202.3 Learners, student learners, apprentices, and handicapped workers.

Learners, student learners, apprentices, and handicapped workers may be employed at less than the minimum wage prescribed in § 50-202.2 to the same extent such employment is permitted under section 14 of the Fair Labor Standards Act.

(Sec. 6, 49 Stat. 2038; 41 U.S.C. 40)

[43 FR 28495, June 30, 1978]

Subpart C—Particular or Similar Industries

§ 50-202.16 Bituminous coal industry.

(a) *Definition.* The bituminous coal industry is defined as that industry which produces or furnishes all coal (including lignite) except Pennsylvania anthracite. "Produces or furnishes" includes mining or other extraction, and the loading, screening, sizing, washing, oiling and other preparation of bituminous coal, and activities incidental to these operations. The term "preparation of bituminous coal" does not include any activities performed at Great Lakes or tidewater docks.

(b) *Minimum wages.* The minimum wage for employees (other than auxiliary workers) engaged in the production or furnishing of bituminous coal (including lignite) shall be not less than the amount indicated for each area as follows:

District 1. Eastern Pennsylvania: $2.745.

The following counties in Pennsylvania: Bedford, Blair, Bradford, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Elk, Forest, Fulton, Huntingdon, Jefferson, Lycoming, McKean, Mifflin, Potter, Somerset, Tioga.

Armstrong County, including mines served by the Pittsburgh and Shawmut Railroad on the west bank of the Allegheny River, and north of the Conemaugh division of the Pennsylvania Railroad.

Fayette County, all mines on and east of the line of Indian Creek Valley branch of the Baltimore and Ohio Railroad.

Indiana County, north of but excluding the Saltsburg branch of the Pennsylvania Railroad between Edri and Blairsville, both exclusive.

Westmoreland County, including all mines served by the Pennsylvania Railroad, Torrance, and east.

All coal-producing counties in the State of Maryland.

The following counties in West Virginia: Grant, Mineral, and Tucker.

District 2. Western Pennsylvania: $2.745.

The following counties in Pennsylvania: Allegheny, Beaver, Butler, Greene, Lawrence, Mercer, Venango, Washington.

Armstrong County, west of the Allegheny River and exclusive of mines served by the Pittsburgh and Shawmut Railroad.

Indiana County, including all mines served on the Saltsburg branch of the Pennsylvania Railroad north of Conemaugh River.

Fayette County, except all mines on and east of the line of Indian Creek Valley branch of the Baltimore and Ohio Railroad.

Westmoreland County, including all mines except those served by the Pennsylvania Railroad from Torrance, east.

District 3. Northern West Virginia: $2.745.

The following counties in West Virginia: Barbour, Braxton, Calhoun, Doddridge, Gilmer, Harrison, Jackson, Lewis, Marion, Monongalia, Pleasants, Preston, Randolph, Ritchie, Roane, Taylor, Tyler, Upshur, Webster, Wetzel, Wirt, Wood.

That part of Nicholas County including mines served by the Baltimore and Ohio Railroad and north.

District 4. Ohio: $2.745.

All coal-producing counties in Ohio.

District 5. Michigan: Not less than that minimum wage prescribed in § 50-202.2.

District 6. Panhandle: $2.745.

The following counties in West Virginia: Brooke, Hancock, Marshall, and Ohio.

District 7. Southern Numbered 1: $2.745.

The following counties in West Virginia: Greenbrier, Mercer, Monroe, Pocahontas, Summers.

Fayette County, east of Gauley River and including the Gauley River branch of the Chesapeake and Ohio Railroad and mines served by the Virginian Railway.

McDowell County, that portion served by the Dry Fork Branch of the Norfolk and Western Railroad and east thereof.

Raleigh County, excluding all mines on the Coal River branch of the Chesapeake and Ohio Railroad.

Wyoming County, that portion served by the Gilbert branch of the Virginian Railway

lying east of the mouth of Skin Fork of Guyandot River and that portion served by the main line and the Glen Rogers branch of the Virginian Railway.

The following counties in Virginia: Montgomery, Pulaski, Wythe, Giles, Craig.

Tazewell County, that portion served by the Dry Fork branch to Cedar Bluff and from Bluestone Junction to Boissevain branch of the Norfolk and Western Railroad and Richlands-Jewelll Ridge branch of the Norfolk and Western Railroad.

Buchanan County, that portion served by the Richlands-Jewell Ridge branch of the Norfolk and Western Railroad and that portion of said county on the heaquarters of Dismal Creek, east of Lynn Camp Creek (a tributary of Dismal Creek).

District 8. Southern Numbered 2: $2.745.

The following counties in West Virginia: Boone, Clay, Kanawha, Lincoln, Logan, Mason, Mingo, Putnam, Wayne, Cabell.

Fayette County, west of, but not including mines of the Gauley River branch of the Chesapeake and Ohio Railroad.

McDowell County, that portion not served by and lying west of the Dry Fork branch of the Norfolk and Western Railroad.

Raleigh County, all mines on the Coal River branch of the Chesapeake and Ohio Railroad and north thereof.

Nicholas County, that part south of and not served by the Baltimore and Ohio Railroad.

Wyoming County, that portion served by Gilbert branch of the Virginian Railway lying west of the mouth of Skin Fork of Guyandot River.

The following counties in Virginia: Dickinson, Lee, Russell, Scott, Wise.

All of Buchanan County, except that portion on the headwaters of Dismal Creek, east of Lynn Camp Creek (tributary of Dismal Creek) and that portion served by the Richlands-Jewell Ridge branch of the Norfolk and Western Railroad.

Tazewell County, except portions served by the Dry Fork branch of Norfolk and Western Railroad and Branch from Bluestone Junction to Boissevain branch of Norfolk and Western Railroad and Richlands-Jewell Ridge branch of the Norfolk and Western Railroad.

The following counties in Kentucky: Bell, Boyd, Breathitt, Carter, Clay, Clinton, Elliott, Floyd, Greenup, Harlan, Jackson, Johnson, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, McCreary, Magoffin, Martin, Manifee, Morgan, Owsley, Perry, Pike, Pulaski, Rockcastle, Wayne, Whitley, Wolfe.

The following counties in Tennessee: Anderson, Campbell, Clairborne, Cumberland, Fentress, Morgan, Overton, Pickett, Putnam, Roane, Scott.

The following counties in North Carolina: Lee, Chatham, Moore.

District 9. Kentucky: Not less than that minimum wage prescribed in § 50-202.2.

District 10: Illinois: $2.745.

All coal-producing counties in Illinois.

District 11. Indiana: $2.78.

All coal-producing counties in Indiana.

District 12. Iowa: Not less than that minimum wage prescribed in § 50-202.2.

All coal-producing counties in Iowa.

District 13. Southeastern (Alabama, Georgia, and Tennessee): Not less than that minimum wage prescribed in § 50-202.2.

District 14. Arkansas-Oklahoma: Not less than that minimum wage prescribed in § 50-202.2.

District 15. Southwestern (Kansas, Texas, Missouri, and Oklahoma): Not less than that minimum wage prescribed in § 50-202.2.

District 16. Northern Colorado: $2.796.

The following counties in Colorado: Adams, Arapahoe, Boulder, Douglas, Elbert, El Paso, Jackson, Jefferson, Larimer, Weld.

District 17. Southern Colorado: $2.795.

The following counties in Colorado: All counties not included in northern Colorado district.

The following counties in New Mexico: All coal-producing counties in the State of New Mexico, except those included in the New Mexico district.

District 18. New Mexico: $2.796.

The following counties in New Mexico: Grant, Lincoln, McKinley, Rio Arriba, Sandoval, San Juan, San Miguel, Santa Fe, Socorro.

The following counties in Arizona: Pinal, Navajo, Graham, Apache, Coconino.

All coal-producing counties in California.

District 19. Wyoming: $2.82.

All coal-producing counties in Wyoming.

The following counties in Idaho: Fremont, Jefferson, Madison, Teton, Bonneville, Bingham, Bannock, Power, Caribou, Oneida, Franklin, Bear Lake.

District 20. Utah: $2.82.

All coal-producing counties in Utah.

District 21. North Dakota-South Dakota: Not less than that minimum wage prescribed in § 50-202.2.

District 22. Montana: $2.846.

All coal-producing counties in Montana.

District 23. Washington: $2.735.

All coal-producing counties in Washington. All coal-producing counties in Oregon.

(c) [Reserved]

(d) *Auxiliary workers.* The term "auxiliary workers" as applied to employees in the Bituminous Coal Industry shall include employees who are employed in the following occupations or combinations of occupations:

Engineering:

1. Rodman.
2. Chainman.

3. Assistant transitman.
4. Transitman or transit worker.
5. Corpsman.
6. Surveyor.
7. Junior draftsman.
8. Draftsman.
9. Engineer, mining and civil.
10. Surveyor helper.

Laboratory:
1. Laboratory assistant.
2. Laboratory technician.
3. Sampler.
4. Chemist helper or assistant chemist.
5. Chemist.
6. Laboratory sample grinder.

Shipping:
1. Billing clerk.
2. Shipping clerk.
3. Shipper.
4. Weighmaster or retail weighmaster.
5. Weighman, scaleman, or weighboss.
6. Mine clerk.
7. Payroll clerk.

Supply:
1. Supply clerk, warehouse clerk, or store clerk.
2. Supplyman, warehouseman, storeman, or storekeeper.
3. Supply purchasing agent.

Other:
1. Prospective driller and assistant driller.
2. Other prospecting crew members.
3. Coal inspector.
4. Coal preparation technician.
5. Dispatcher.
6. Electrician or electrical engineer.
7. Shift maintenance foreman.
8. Machinist foreman.
9. Lampman.
10. Utility truck driver.
11. Machinist.
12. Timekeeper and assistant timekeeper.
13. Powerhouse, sub-station, and pump attendant.
14. Hoisting engineer.
15. Employees of regular dealers in coal and employees of contractors who are exempt from section 1(a) of the Act pursuant to § 50-201.604(a) of this chapter, who do not work in or around coal mines.

(41 U.S.C. 43a)

[26 FR 9042, Sept. 26, 1961, as amended at 33 FR 2388, Jan. 31, 1968; 43 FR 28495, June 30, 1978]

PART 50-203—RULES OF PRACTICE

Subpart A—Proceedings Under Section 5 of the Walsh-Healey Public Contracts Act

Sec.
50-203.1 Reports of breach or violation.
50-203.2 Issuance of a formal complaint.
50-203.3 Answer.
50-203.4 Motions.
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Subpart C—Minimum Wage Determinations Under the Walsh-Healey Public Contracts Act

50-203.15 Initiation of proceeding.
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50-203.17 Hearings.
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50-203.20 Examination of witnesses.
50-203.21 Decisions.
50-203.22 Effective date of determinations.
50-203.23 Delegation of authority.

AUTHORITY: Sec. 4, 49 Stat. 2038; 41 U.S.C. 38, unless otherwise noted.

Subpart A—Proceedings Under Section 5 of the Walsh-Healey Public Contracts Act

SOURCE: 11 FR 14493, Dec. 18, 1946, unless otherwise noted. Redesignated at 24 FR 10952, Dec. 30, 1959.

§ 50-203.1 Reports of breach or violation.

(a) Any employer, employee, labor or trade organization or other interested person or organization may report a breach or violation, or apparent breach or violation of the Walsh-Healey Public Contracts Act of June 30, 1936 (49 Stat. 2036, as amended; 41 U.S.C. 35-45), or of any of the rules or regulations prescribed thereunder.

(b) A report of breach or violation may be reported to the nearest regional or local office of the Workplace Standards Administration, U.S. Department of Labor, or with the Administrator of Workplace Standards, U.S. Department of Labor, Washington, D.C. 20210.

(c) [Reserved]

(d) In the event that a Regional Director of the Wage and Hour and Public Contracts Divisions is notified of a breach or violation which also involves safety and health standards, such Director shall notify the appropriate Regional Director of the Bureau of Labor Standards who shall with respect to the safety and health violation take action commensurate with his responsibilities pertaining to safety and health standards.

(e) The report should contain the following:

(1) The full name and address of the person or organization reporting the breach or violation.

(2) The full name and address of the person against whom the report is made, hereinafter referred to as the "respondent".

(3) A clear and concise statement of the facts constituting the alleged breach or violation of any of the provisions of the Walsh-Healey Public Contracts Act, or of any of the rules or regulations prescribed thereunder.

(41 U.S.C. 35, 40; 5 U.S.C. 556)

[32 FR 7702, May 26, 1967, as amended at 36 FR 288, Jan. 8, 1971]

§ 50-203.2 Issuance of a formal complaint.

After a report of a breach or violation has been filed, or upon his own motion and without any report of a breach or violation having been previously filed, the Deputy Solicitor may issue and cause to be served upon the respondent a formal complaint stating the charges. Notice of hearing before a Trial Examiner designated by the Secretary of Labor shall be issued and served within a reasonable time after the issuance of the complaint. A copy of the complaint and notice of hearing shall be served upon the surety or sureties. Unless the Trial Examiner otherwise determines, the date of hearing shall not be sooner than 30 days after the date of issuance of the complaint.

[35 FR 14839, Sept. 24, 1970]

§ 50-203.3 Answer.

(a) The respondent shall have the right, unless otherwise specified in the complaint and notice, within twenty (20) days after date of issuance of the formal complaint, to file an answer thereto. Such answer shall not be limited to a mere denial of the charges. It shall specifically deny or admit each of the charges, and, if the answer is in denial of any one of the charges, it shall contain a concise statement of the facts relied upon in support of the denial. Any charges not specifically denied in the answer shall be deemed to be admitted and may be so found by the Examiner, unless the respondent disclaims knowledge upon which to make a denial. If the answer should admit any charge but the respondent believes there are reasons or circumstances warranting special consideration, such reasons and circumstances should be fully but concisely stated.

(b) Such answer shall be in writing, and signed by the respondent or his attorney or by any other duly authorized agent with power of attorney affixed.

(c) If no answer is filed, or if the answer as filed does not warrant a postponement of the hearing, such hearing will be held as scheduled.

(d) The original and two copies of the answer shall be filed with the Chief Trial Examiner, Department of Labor, Washington, D.C.

(e) In any case where formal complaints have been amended, the respondent shall have the right to amend his answer within such time as may be fixed by the Trial Examiner.

§ 50-203.4 Motions.

(a) All motions except those made at the hearing shall be filed in writing with the Chief Trial Examiner, Department of Labor, Washington, D.C., and shall be included in the record. Such motions shall state briefly the order or relief applied for and the grounds for such motion. The moving party shall file an original and two copies of all such motions. All motions made at the hearing shall be stated orally and included in the stenographic report of the hearing.

(b) The Trial Examiner designated to conduct the hearing may in his discretion reserve his ruling upon any question or motion.

§ 50-203.5 **Intervention.**

Any employer, employee, labor or trade organization or other interested person or organization desiring to intervene in any pending proceeding prior to, or at the time it is called for hearing, but not after a hearing, except for good cause shown, shall file a petition in writing for leave to intervene, which shall be served on all parties to the proceeding, with the Chief Trial Examiner, Department of Labor, or with the Trial Examiner designated to conduct the hearing, setting forth the position and interest of the petitioner and the grounds of the proposed intervention. The Chief Trial Examiner, or the Trial Examiner, as the case may be, may grant leave to intervene to such extent and upon such terms as he shall deem just.

§ 50-203.6 **Witnesses and subpoenas.**

(a) Witnesses shall be examined orally under oath except that for good and exceptional cause the Trial Examiner may permit their testimony to be taken by deposition under oath.

(b) The Trial Examiner (or the Administrator holding the hearing as provided in § 50-203.8(m)) shall upon application by any party, and upon a showing of general relevance and reasonable scope of the evidence sought, issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence under oath, including books, records, correspondence, or documents. Applications for the issuance of subpoenas duces tecum shall specify the books, records, correspondence or other documents sought.

(c) Witnesses summoned before the Trial Examiner shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear, and the person taking the depositions shall be paid by the party at whose instance the depositions are taken.

[11 FR 14493, Dec. 18, 1946. Redesignated at 24 FR 10952, Dec. 30, 1959, and amended at 36 FR 289, Jan. 8, 1971]

§ 50-203.7 **Prehearing conferences.**

(a) At any time prior to the hearing the Trial Examiner may, on motion of the parties or on his own motion, whenever it appears that the public interest will be served thereby, direct the parties to appear before him for a conference at a designated time and place to consider, among other things:

(1) Simplification of the issues;

(2) The necessity or desirability of amending the pleadings for purposes of clarification, amplification or limitation;

(3) Obtaining stipulations of fact or admissions of undisputed facts or the authenticity of documents;

(4) The procedure at the hearing;

(5) Limiting the number of witnesses;

(6) The propriety of mutual exchange among parties of prepared testimony or exhibits; or

(7) Any other matters which would tend to expedite the disposition of the proceeding.

(b) The action taken at the conference may be recorded, in summary form or otherwise, for use at the hearing. Such record, when agreed to by the parties and approved by the Trial Examiner, shall be conclusive as to the action embodied therein. Stipulations and admissions of fact and amendments to pleadings shall be made a part of the record of the proceeding.

§ 50-203.8 **Hearing.**

(a) The hearing for the purpose of taking evidence upon a formal complaint shall be conducted by a Trial Examiner specifically designated by the Secretary of Labor, or designated by an authorized official of the Department of Labor, acting for the Secretary of Labor. Trial Examiners shall, so far as practicable, be assigned to cases in rotation. In case of the death, illness, disqualification or unavailability of the Trial Examiner presiding in any proceeding, another Trial Examiner may be designated to take his place. Such hearings shall be open to the public unless otherwise ordered by the Trial Examiner.

(b) The Trial Examiners shall perform no duties inconsistent with their duties and responsibilities as examiners. Save to the extent required for the disposition of ex parte matters as authorized by law, no Trial Examiner shall consult any person or party as to any fact in issue unless upon notice and opportunity for all parties to participate.

(c) Trial Examiners shall act independently in the performance of their functions as examiners and shall not be responsible to, or subject to the supervision or direction of, any officer, employee or agent engaged in the performance of investigative or prosecuting functions for the Department of Labor in the enforcement of the Public Contracts Act.

(d) At all hearings it shall be the right of counsel for the Government to open and close, subject to the right of the Trial Examiner to designate, upon cause shown, who shall open and close.

(e) It shall be the duty of the Trial Examiner to inquire fully into the facts as to whether the respondent has breached or violated any of the provisions of the Walsh-Healey Public Contracts Act of June 30, 1936 (49 Stat. 2036, as amended; 41 U.S.C. 35-45), or any rules or regulations prescribed thereunder, as set forth in the formal complaint. Counsel for the Government, and the Trial Examiner, shall have the power to call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence.

(f) Any party to the proceeding shall have the right to appear at such hearing in person, by counsel, or otherwise, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence.

(g) In any such proceedings, the rules of evidence prevailing in courts of law or equity shall not be controlling. However, it shall be the policy to exclude irrelevant, immaterial, or unduly repetitious evidence.

(h) In any such proceedings, in the discretion of the Trial Examiner, stipulations of fact may be made with respect to any issue.

(i) Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, shall be stated orally, together with a short statement of the grounds for such objection, and included in the stenographic report of the hearing. No such objection shall be deemed waived by further participation in the proceeding.

(j) Unless the Trial Examiner otherwise directs, any party to the proceeding shall be entitled to a reasonable period at the close of the hearing for oral argument, which shall not be included in the stenographic report of the hearing unless the Examiner directs.

(k) In the discretion of the Trial Examiner, the hearing may be continued from day to day, or adjourned to a later date, or to a different place, by announcement thereof at the hearing by the Trial Examiner, or by other appropriate notice.

(l) Contemptuous conduct at any hearing before a Trial Examiner shall be ground for exclusion from the hearing. The failure or refusal of a witness to appear at any such hearing or to answer any question which has been ruled to be proper shall be ground for the action provided in section 5 of the Walsh-Healey Public Contracts Act of June 30, 1936 (sec. 5, 49 Stat. 2039; 41 U.S.C. 39), and in the discretion of the Trial Examiner may be ground for the striking out of all testimony which may have been previously given by such witness on related matters.

(m) The Administrator of Workplace Standards may, in his discretion, direct that in lieu of the procedure set forth in paragraph (a) of this section, the hearing on formal complaint shall be held in the first instance before him; in which event the Administrator shall issue an order embodying his decision.

[11 FR 14493, Dec. 18, 1946. Redesignated at 24 FR 10952, Dec. 30, 1959, and amended at 36 FR 289, Jan. 8, 1971]

§ 50-203.9 Briefs.

(a) Any interested person or organization shall be entitled to file with the Trial Examiner, Department of Labor, Washington, D.C., briefs, proposed findings of fact or conclusions of law, or other written statements, within

the time allowed by the Trial Examiner.

(b) Any brief or written statement shall be stated in concise terms.

(c) Three copies of all such documents shall be filed.

(d) Briefs or written statements of more than twenty pages shall be properly indexed.

§ 50-203.10 Decision of the Trial Examiner.

(a) Following the hearing and upon completion of the record, the Trial Examiner shall issue an order and decision embodying his findings of fact and conclusions of law on all issues as to whether respondent has violated the representations and stipulations of the act and the amount of damages due therefor, which shall become final, unless a petition for review is filed under § 50-203.11, before the expiration of the time provided for the filing of such petition. The decision of the Trial Examiner shall be inoperative unless and until it becomes final. If the respondent is found to have violated the act, the Trial Examiner in his decision shall make recommendations to the Secretary of Labor as to whether respondent should be relieved from the application of the ineligible list provisions of section 3 of the Walsh-Healey Public Contracts Act of June 30, 1936 (sec. 3, 49 Stat. 2037; 41 U.S.C. 37).

(b) The decision of the Trial Examiner shall be made part of the record, and a copy thereof shall be served upon the respondent or respondents by mailing a copy thereof by registered mail to the respondent or respondents or to the attorney or attorneys of record. Upon request from employees or other interested persons, the decision will be served upon such persons, and in the discretion of the Trial Examiner, the decision will be served upon such other persons or their attorneys who appeared at the hearing or upon brief by mailing a copy thereof to such persons.

§ 50-203.11 Review.

(a) Within twenty (20) days after service of the decision of the Trial Examiner any interested party to the proceeding may file with the Chief Trial Examiner an original and four copies of a petition for review of the decision. The petition shall set out separately and particularly each error assigned. The request for review and the record will then be certified to the Administrator of Workplace Standards.

(b) The petitioner may file a brief (original and four copies) in support of his petition within the period allowed for the filing of the petition. Any interested person upon whom the decision has been served may file within ten (10) days after the expiration of the period within which the petition is required to be filed a brief in support of or in opposition to the Trial Examiner's decision.

(c) The petition and the briefs filed under this section shall make specific reference to the pages of the transcript or of the exhibits which are relevant to the errors asserted with respect to findings of fact, and objections to such findings which are not so supported will not be considered.

(d) No matter properly subject to objection before the Trial Examiner will be considered by the Administrator unless it shall have been raised before the Trial Examiner or unless there were reasonable grounds for failure so to do; nor will any matter be considered by the Administrator unless included in the assignment or errors. In the discretion of the Administrator, review may be denied if the petition and brief in support thereof fail to show adequate cause for such review.

(e) The order denying review, or the decision of the Administrator, whichever is entered, will be made a part of the record, and a copy of such order or decision will be served upon the parties who were served with a copy of the Trial Examiner's decision.

(f) If the respondent is found to have violated the Act, the Administrator in his decision shall make recommendations to the Secretary of Labor as to whether respondent shall be relieved from the application of the ineligible-list provisions of section 3 of the Walsh-Healey Public Contracts Act (sec. 4, 49 Stat. 2039; 41 U.S.C. 37).

(g) Application for relief from the ineligible-list provisions of section 3 shall be filed by the respondent with

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the Secretary of Labor within 20 days from the date of service of the Trial Examiner's decision or the Administrator's decision.

(b) Notice of the determination of the Secretary on the application of the ineligible-list provisions of section 3 of the Walsh-Healey Public Contracts Act (sec. 3, 49 Stat. 2037; 41 U.S.C. 37) shall be served upon the parties who were served with a copy of the Trial Examiner's decision or the Administrator's decision, as the case may be.

[11 FR 14493, Dec. 18, 1946. Redesignated at 24 FR 10952, Dec. 30, 1959, and amended at 36 FR 289, Jan. 8, 1971]

§ 50-203.12 Effective date.

Sections 50-203.1 to 50-203.11 shall become effective upon publication in the FEDERAL REGISTER (Dec. 18, 1946); *Provided, however,* That in any case where a hearing has begun or has been completed prior to said publication, the proceeding shall be conducted pursuant to the rules of practice in effect at the time the proceeding was initiated unless the parties stipulate in writing or orally for the record that the proceeding be conducted in accordance with §§ 50-203.1 to 50- 203.12.

Subpart B—Exceptions and Exemptions Pursuant to Section 6 of the Walsh-Healey Public Contracts Act

§ 50-203.13 Requests for exceptions and exemptions.

(a) Request for the exception or exemption of a contract or class of contracts from the inclusion or application of one or more of those stipulations required by § 50-201.1 of this chapter must be made by the head of a contracting agency or department and shall be accompanied with a finding by him setting forth reasons why such inclusion or application will seriously impair the conduct of Government business.

(b) Request for the exception or exemption of a stipulation respecting minimum rates of pay and maximum hours of labor contained in an existing contract must be made jointly by the head of a contracting agency and the contractor and shall be accompanied with a joint finding by them setting forth reasons why such exception or exemption is desired.

(c) All requests for exceptions or exemptions which relate solely to safety and health standards shall be transmitted directly to the Bureau of Labor Standards, WSA, Department of Labor. All other requests for exceptions or exemptions shall be transmitted to the Office of Government Contracts Wage Standards, WSA, of the Department of Labor.

[12 FR 446, Jan. 22, 1947. Redesignated at 24 FR 10952, Dec. 30, 1959, and amended at 36 FR 289, Jan. 8, 1971]

§ 50-203.14 Decisions concerning exceptions and exemptions.

Decisions concerning exceptions and exemptions shall be in writing and approved by the Secretary of Labor or officer prescribed by him, originals being filed in the Department of Labor, and certified copies shall be transferred to the department or agency originating the request and to the Comptroller General. All such decisions shall be promulgated to all contracting agencies by the Office of Government Contracts Wage Standards, WSA of the Department of Labor.

[36 FR 289, Jan. 8, 1971]

Subpart C—Minimum Wage Determinations Under the Walsh-Healey Public Contracts Act

SOURCE: 17 FR 7944, Aug. 30, 1952, unless otherwise noted. Redesignated at 24 FR 10952, Dec. 30, 1959.

§ 50-203.15 Initiation of proceeding.

Wage determination proceedings may be initiated by the Secretary of Labor with respect to any industry. The proceedings may be initiated by the Secretary of Labor upon his own motion or upon the request of any party showing a proper interest in the industry.

§ 50-203.16 Industry panel meetings.

The Secretary of Labor may, within his discretion, invite representatives of employers and employees in an industry to meet as an informal panel group to discuss with representatives of the

Department of Labor the various questions relating to the issuance of a wage determination for the industry.

§ 50-203.17 Hearings.

(a) Hearings held for the purpose of receiving evidence with regard to prevailing minimum wages in the various industries shall be conducted by the Secretary of Labor or by a duly assigned Hearing Examiner.

(b) Due notice of hearing shall be published in the FEDERAL REGISTER.

(c) The hearing shall be stenographically reported and a transcript made which will be available to any person at prescribed rates upon request addressed to the Secretary, United States Department of Labor, Washington, D.C. 20210.

(d) At the discretion of the Presiding Officer, the hearing may be continued from day to day or adjourned to a later date, or to a different place by announcement thereof at the hearing or by other appropriate notice.

§ 50-203.18 Evidence.

(a) Witnesses appearing at the hearing need not be sworn. The Presiding Officer may, however, within his discretion, require that witnesses take an oath or affirmation as to testimony submitted.

(b) Written statements may be filed any time prior to the date of the hearing by persons who cannot appear personally.

(c) Written documents and exhibits shall be tendered in quadruplicate. When evidence is embraced in a document containing matter not intended to be put in evidence, within the discretion of the Presiding Officer, such a document will not be received but the person offering the same may present to the Presiding Officer the original document together with two copies of those portions of the document intended to be put in evidence.

(d) At any stage of the hearing, the Presiding Officer may call for further evidence upon any matter. After the hearing has been closed, no further evidence shall be taken, except at the request of the Secretary, unless provision has been made at the hearing for the later receipt of such evidence. In the event that the Secretary shall cause the hearing to be reopened for the purpose of receiving further evidence, due and reasonable notice of the time and place fixed for such taking of testimony shall be given to all persons who have appeared at the hearing or filed a notice of intention to appear at the hearing.

(e) The rules of evidence prevailing in courts of law or equity shall not be controlling. However, it shall be the policy to exclude irrelevant, immaterial, or unduly repetitious evidence.

§ 50-203.19 Subpoenas and witness fees.

(a) Subpoenas requiring the attendance of witnesses or the presentation of a document from any place in the United States at any designated place of hearing shall be issued by the Secretary or the Hearing Examiner upon request and upon a timely showing, in writing, of the general relevance and reasonable scope of the evidence sought. Any person appearing in the proceeding may apply for the issuance of a subpoena. Such application shall identify exactly the witness or document and state fully the nature of the evidence proposed to be secured.

(b) Witnesses summoned by the Secretary shall be paid the same fees and mileage as are paid witnesses in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance witnesses appear, and the Secretary before issuing a subpoena may require a deposit of an amount adequate to cover the fees and mileage involved.

§ 50-203.20 Examination of witnesses.

The Presiding Officer shall, consistent with orderly procedure, permit any person appearing at the hearing to conduct such examination or cross-examination of any witness as may be required for a full and true disclosure of the facts, and to object to the admission or exclusion of evidence. Objections to the admission or exclusion of evidence shall be stated briefly with the reasons relied on. Such objections shall become a part of the record, but the record shall not include argument thereon except as ordered by the Presiding Officer.

§ 50-203.21 Decisions.

(a) Within 30 days after the close of the hearing, each interested person appearing at the hearing may file with the Presiding Officer an original and four copies of a statement containing proposed findings of fact and conclusions of law, together with reasons for such proposals. Whenever the Presiding Officer is a duly assigned Hearing Examiner, he shall, immediately following the termination of the thirty-day period provided for the filing of proposed findings and conclusions, certify the complete record to the Secretary.

(b) Upon the basis, and after consideration, of the whole record, the Secretary may issue a tentative decision. The tentative decision shall become part of the record, and shall include: (1) A statement of findings and conclusions, with the reasons and bases therefor, upon all material issues of fact, law, or discretion presented on the record, and (2) any proposed wage determination. Any tentative decision shall be published in the FEDERAL REGISTER.

(c) Within twenty-one days following the publication of any tentative decision in the FEDERAL REGISTER, any interested person may file an original and four copies of a statement containing exemptions to the tentative decision, together with supporting reasons.

(d) Thereafter, the Secretary may issue a final decision ruling upon each exception filed and including any appropriate wage determination. Any final decision shall be published in the FEDERAL REGISTER.

[26 FR 8945, Sept. 22, 1961]

§ 50-203.22 Effective date of determinations.

Any minimum wage determination issued as a result of hearings held under this subpart shall take effect not less than 30 days after due notice is given of the issuance thereof by publication in the FEDERAL REGISTER, or at such time prior thereto as may be provided therein upon good cause found and published therewith.

§ 50-203.23 Delegation of authority.

The duties of the Secretary of Labor under this subpart may be exercised in any particular proceeding by the Secretary of Labor, the Assistant Secretary for Workplace Standards, or the Administrator of Workplace Standards, Department of Labor.

[36 FR 289, Jan. 8, 1971]

PART 50-204—SAFETY AND HEALTH STANDARDS FOR FEDERAL SUPPLY CONTRACTS

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Subpart E—Transportation Safety

50-204.75 Transportation safety.

AUTHORITY: Secs. 1, 4, 49 Stat. 2036, 2038, as amended; 41 U.S.C. 35, 38; 5 U.S.C. 556.

SOURCE: 34 FR 7946, May 20, 1969, unless otherwise noted.

Subpart A—Scope and Application

§ 50-204.1 Scope and Application.

(a) The Walsh-Healey Public Contracts Act requires that contracts entered into by any agency of the United States for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000 must contain, among other provisions, a stipulation that "no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection." (sec. 1(e)), 49 Stat. 2036, 41 U.S.C. 35(e)). This Part 50-204 expresses the Secretary of Labor's interpretation and application of this provision with regard to certain particular working conditions. In addition, §§ 50-204.27, 50-204.30, 50-204.31, 50-204.32, 50-204.33, and 50-204.36 contain requirements concerning the instruction of personnel, notification of incidents, reports of exposures, and maintenance and disclosure of records.

(b)(1) Every investigator conducting investigations and every officer of the Department of Labor determining whether there are or have been violations of the safety and health requirements of the Walsh-Healey Public Contracts Act and of any contract subject thereto; and whether a settlement of the resulting issues should be made without resort to administrative or court litigation, shall treat a failure to comply with, or violation of, any of the safety and health measures contained in this Part 50-204 as resulting in working conditions which are "unsanitary or hazardous or dangerous to the health and safety of employees" within the meaning of section 1(e) of the Act and the contract stipulation it requires. Evidence of compliance with the safety, sanitary, and factory inspection laws of a State in which the work, or part thereof, is performed will be considered prima facie evidence of compliance with the safety and health requirements of the Act and of any contract subject thereto, and it shall be sufficient unless rebutted or overcome by a preponderance of evidence of a failure to comply with any applicable safety and health rules contained in this part.

(2) Every investigator shall have technical competence in safety, industrial hygiene, or both as may be appropriate, in the matters under investigation.

(c) [Reserved]

(d) The standards expressed in this Part 50-204 are for application to ordinary employment situations; compliance with them shall not relieve anyone from the obligation to provide protection for the health and safety of his employees in unusual employment situations. Neither do such standards purport to describe all of the working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees. Where such other working conditions may be found to be unsanitary or hazardous or dangerous to the health and safety of employees, professionally accepted

safety and health practices will be used.

(e) Compliance with the standards expressed in this Part 50-204 is not intended, and shall not be deemed to relieve anyone from any other obligation he may have to protect the health and safety of his employees, arising from sources other than the Walsh-Healey Public Contracts Act, such as State, local law or collective bargaining agreement.

[34 FR 7946, May 20, 1969, as amended at 36 FR 9868, May 29, 1971]

§ 50-204.1a Variances.

(a) Variances from standards in this part may be granted in the same circumstances in which variances may be granted under sections 6(b)(6)(A) or 6(d) of the Williams-Steiger Occupational Safety and Health Act of 1970 (29 U.S.C. 655). The procedures for the granting of variances and for related relief under this part are those published in Part 1905 of Title 29, Code of Federal Regulations.

(b) Any requests for variances shall also be considered requests for variances under the Williams-Steiger Occupational Safety and Health Act of 1970, and any variance from a standard which is contained in this part and which is incorporated in Part 1910 of Title 29, Code of Federal Regulations, shall be deemed a variance from the standard under both the Walsh-Healey Public Contracts Act and the Williams-Steiger Occupational Safety and Health Act of 1970. In accordance with the requirements of § 1954.3(d)(1)(i) of Title 29, Code of Federal Regulations, variance actions taken under State provisions under a State occupational safety and health plan approved under section 18 of the Occupational Safety and Health Act of 1970 with regard to State standards found to be at least as effective as the comparable Federal standards contained in this Part and incorporated in Part 1910 of Title 29, Code of Federal Regulations, shall be deemed a variance action from the standard under both the Walsh-Healey Public Contracts Act and the Occupational Safety and Health Act of 1970.

[36 FR 9868, May 29, 1971, as amended at 40 FR 25452, June 16, 1975]

Subpart B—General Safety and Health Standards

§ 50-204.2 General safety and health standards.

(a) Every contractor shall protect the safety and health of his employees by complying with the standards described in the subparagraphs of this paragraph whenever a standard deals with an occupational safety or health subject or issue involved in the performance of the contract.

(1) U.S. Department of Labor—Title 29 CFR—

Part 1501—Safety and Health Regulations for Ship Repairing.
Part 1502—Safety and Health Regulations for Shipbuilding.
Part 1503—Safety and Health Regulations for Shipbreaking.
Part 1504—Safety and Health Regulations for Longshoring.
Part 1910—Subpart C through Subpart S (national consensus standards).

(2) U.S. Department of Interior, Bureau of Mines.

(i) In Chapter I of Title 30, Code of Federal Regulations, the standards requiring safe and healthful working conditions or surroundings in:

Subchapter B—Respiratory Protective Apparatus; Tests for Permissibility; Fees.
Subchapter C—Explosives and Related Articles; Tests for Permissibility and Suitability.
Subchapter D—Electrical Equipment, Lamps, Methane Detectors; Tests for Permissibility; Fees.
Subchapter O—Coal Mine Health and Safety.

(ii) In Chapter II of Title 30 the standards requiring safe and healthful working conditions or surroundings in:

Part 211—Coal-Mining Operating and Safety Regulations.
Part 216—Operating and Safety Regulations Governing the Mining of Coal in Alaska.
Part 221—Oil and Gas Operating Regulations.
Part 231—Operating and Safety Regulations Governing the Mining of Potash; Oil Shale, Sodium, and Phosphate; Sulphur; and Gold, Silver, or Quicksilver; and Other Nonmetallic Minerals, Including Silica Sand.

(3) U.S. Department of Transportation: 49 CFR Parts 171-179 and 14 CFR Part 103 Hazardous material regulation—Transportation of compressed gases.

(4) U.S. Department of Agriculture Respiratory Devices for Protection against Certain Pesticides—ARS-33-76-2.

(b) Information concerning the applicability of the standards prescribed in paragraph (a) of this section may be obtained from the following offices:

(1) Office of the Bureau of Labor Standards, U.S. Department of Labor, Railway Labor Building, Washington, D.C. 20210.

(2) The regional and field offices of the Bureau of Labor Standards which are listed in the U.S. Government Organization Manual, 1970-71 edition at p. 324.

(c) In applying the safety and health standards referred to in paragraph (a) of this section the Secretary may add to, strengthen or otherwise modify any standards whenever he considers that the standards do not adequately protect the safety and health of employees as required by the Walsh-Healey Public Contracts Act.

[34 FR 7946, May 20, 1969, as amended at 36 FR 9868, May 29, 1971]

§ 50-204.3 Material handling and storage.

(a) Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repair, with no obstruction across or in aisles that could create a hazard. Permanent aisles and passageways shall be appropriately marked.

(b) Storage of material shall not create a hazard. Bags, containers, bundles, etc. stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse.

(c) Storage areas shall be kept free from accumulation of materials that constitute hazards from tripping, fire, explosion, or pest harborage. Vegetation control will be exercised when necessary.

(d) Proper drainage shall be provided.

(e) Clearance signs to warn of clearance limits shall be provided.

(f) Derail and/or bumper blocks shall be provided on spur railroad tracks where a rolling car could contact other cars being worked, enter a building, work or traffic area.

(g) Covers and/or guard rails shall be provided to protect personnel from the hazards of open pits, tanks, vats, ditches, etc.

[34 FR 7946, May 20, 1969; 35 FR 1015, Jan. 24, 1970]

§ 50-204.4 Tools and equipment.

Each employer shall be responsible for the safe condition of tools and equipment used by employees, including tools and equipment which may be furnished by employees.

§ 50-204.5 Machine guarding.

(a) One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, in going nip points, rotating parts, flying chips and sparks. Examples of guarding methods are—Barrier guards, two hand tripping devices, electronic safety devices, etc.

(b) General requirements for machine guards. Guards shall be affixed to the machine where possible and secured elsewhere if for any reason attachment to the machine is not possible. The guard shall be such that it does not offer an accident hazard in itself.

(c) Point of Operation Guarding.

(1) Point of operation is the area on a machine where work is actually performed upon the material being processed.

(2) Where existing standards prepared by organizations listed in § 50-204.2 provide for point of operation guarding such standards shall prevail. Other types of machines for which there are no specific standards, and the operation exposes an employee to injury, the point of operation shall be guarded. The guarding device shall be so designed and constructed so as to prevent the operator from having any

part of his body in the danger zone during the operating cycle.

(3) Special hand tools for placing and removing material shall be such as to permit easy handling of material without the operator placing a hand in the danger zone. Such tools shall not be in lieu of other guarding required by this section, but can only be used to supplement protection provided.

(4) The following are some of the machines which usually require point of operation guarding:

Guillotine cutters.
Shears.
Alligator shears.
Power presses.
Milling machines.
Power saws.
Jointers.
Portable power tools.
Forming rolls and calenders.

(d) Revolving drums, barrels and containers shall be guarded by an enclosure which is interlocked with the drive mechanism, so that the barrel, drum or container cannot revolve unless the guard enclosure is in place.

(e) When the periphery of the blades of a fan is less than seven (7) feet above the floor or working level, the blades shall be guarded. The guard shall have openings no larger than one half (½) inch.

(f) Machines designed for a fixed location shall be securely anchored to prevent walking or moving.

§ 50-204.6 Medical services and first aid.

(a) The employer shall ensure the ready availability of medical personnel for advice and consultation on matters of plant health.

(b) In the absence of an infirmary, clinic or hospital in near proximity to the work place which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. First aid supplies approved by the consulting physician shall be readily available.

(c) Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

[34 FR 7946, May 20, 1969; 35 FR 1015, Jan. 24, 1970]

§ 50-204.7 Personal protective equipment.

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in function of any part of the body through absorption, inhalation or physical contact. Where employees provide their own protective equipment, the employer shall be responsible to assure its adequacy, including proper maintenance and sanitation of such equipment. All personal protective equipment shall be of safe design and construction for the work to be performed.

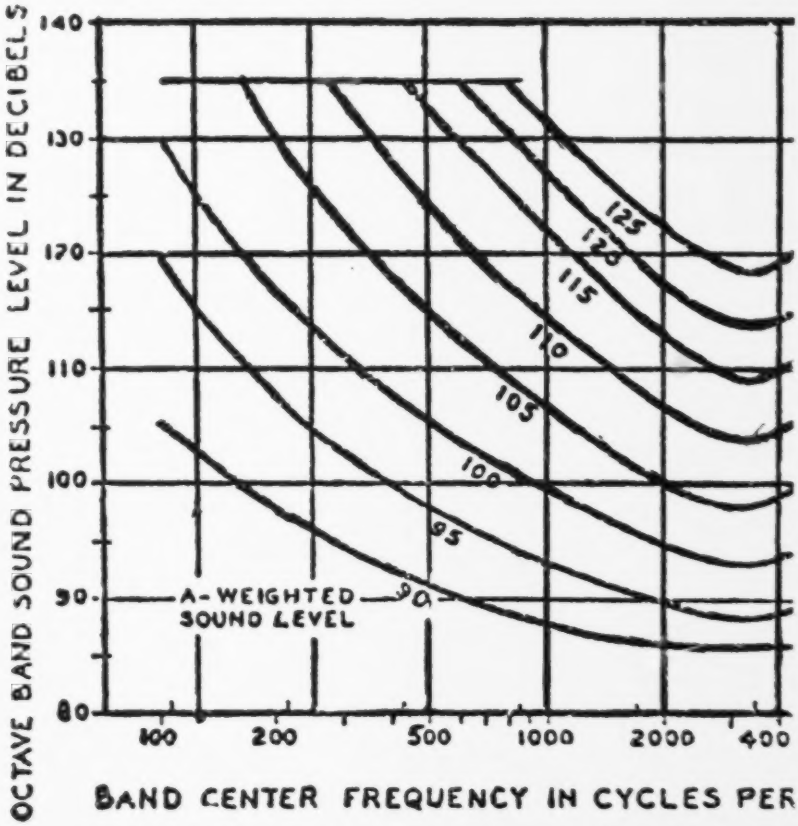
[35 FR 1015, Jan. 24, 1970]

§ 50-204.8 Use of compressed air.

Compressed air shall not be used for cleaning purposes except where reduced to less than 30 p.s.i. and then only with effective chip guarding and personal protective equipment.

§ 50-204.10 Occupational noise exposure.

(a) Protection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table I of this section when measured on the A scale of a standard sound level meter at slow response. When noise levels are determined by octave band analysis, the equivalent A-weighted sound level may be determined as follows:



Equivalent sound level contours. Octave band sound pressure levels may be converted to the equivalent A-weighted sound level by plotting them on this graph and noting the A-weighted sound level corresponding to the point of highest penetration into the sound level contours. This equivalent A-weighted sound level, which may differ from the actual A-weighted sound level of the noise, is used to determine exposure limits from Table I.

(b) When employees are subject to sound exceeding those listed in Table I of this section, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of the table, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

(c) If the variations in noise level involve maxima at intervals of 1 second or less, it is to be considered continuous.

(d) In all cases where the sound levels exceed the values shown herein, a continuing, effective hearing conservation program shall be administered.

Table I

PERMISSIBLE NOISE EXPOSURES [1]

Duration per day, hours	Sound level dBA slow response
8	90
6	92
4	95
3	97
2	100
1½	102
1	105
½	110
¼ or less	115

[1] When the daily noise exposure is composed of two or more periods of noise exposure of different levels, their combined effect should be considered, rather than the individual effect of each. If the sum of the following fractions: C1/T1 + C2/T2 * * * Cn/Tn exceeds unity, then, the mixed exposure should be considered to exceed the limit value. Cn indicates the total time of exposure at a specified noise level, and Tn indicates the total time of exposure permitted at that level.

Exposure to impulsive or impact noise should not exceed 140 dB peak sound pressure level.

[34 FR 7946, May 20, 1969, as amended at 35 FR 1015, Jan. 24, 1970]

Subpart C—Radiation Standards

§ 50-204.20 Radiation—definitions.

As used in this subpart:

(a) "Radiation" includes alpha rays, beta rays, gamma rays, X-rays, neutrons, high-speed electrons, high-speed protons, and other atomic particles; but such term does not include sound or radio waves, or visible light, or infrared or ultraviolet light.

(b) "Radioactive material" means any material which emits, by spontaneous nuclear disintegration, corpuscular or electromagnetic emanations.

(c) "Restricted area" means any area access to which is controlled by the employer for purposes of protection of individuals from exposure to radiation or radioactive materials.

(d) "Unrestricted area" means any area access to which is not controlled by the employer for purposes of protection of individuals from exposure to radiation or radioactive materials.

(e) "Dose" means the quantity of ionizing radiation absorbed, per unit of mass, by the body or by any portion of the body. When the provisions in this subpart specify a dose during a period of time, the dose is the total quantity of radiation absorbed, per unit of mass, by the body or by any portion of the body during such period of time. Several different units of dose are in current use. Definitions of units used in this subpart are set forth in paragraphs (f) and (g) of this section.

(f) "Rad" means a measure of the dose of any ionizing radiation to body tissues in terms of the energy absorbed per unit of mass of the tissue. One rad is the dose corresponding to the absorption of 100 ergs per gram of tissue (1 millirad (mrad)=0.001 rad).

(g) "Rem" means a measure of the dose of any ionizing radiation to body tissue in terms of its estimated biological effect relative to a dose of 1 roentgen (r) of X-rays (1 millirem (mrem)=0.001 rem). The relation of the rem to other dose units depends upon the biological effect under consideration and upon the conditions for irradiation. Each of the following is considered to be equivalent to a dose of 1 rem:

(1) A dose of 1 rad due to X- or gamma radiation;

(2) A dose of 1 rad due to X-, gamma, or beta radiation;

(3) A dose of 0.1 rad due to neutrons or high energy protons;

(4) A dose of 0.05 rad due to particles heavier than protons and with sufficient energy to reach the lens of the eye;

(5) If it is more convenient to measure the neutron flux, or equivalent, than to determine the neutron dose in rads, as provided in paragraph (g)(3) of this section, 1 rem of neutron radiation may, for purposes of the provisions in this subpart be assumed to be equivalent to 14 million neutrons per square centimeter incident upon the body; or, if there is sufficient information to estimate with reasonable accuracy the approximate distribution in energy of the neutrons, the incident number of neutrons per square centimeter equivalent to 1 rem may be estimated from the following table:

Neutron Flux Dose Equivalents

Neutron energy (million electron volts [Mev])	Number of neutrons per square centimeter equivalent to a dose of 1 rem (neutrons/cm^2)	Average flux to deliver 100 millirem in 40 hours (neutrons/cm^2 per sec.)
Thermal	970×10^6	670
0.0001	720×10^6	500
0.005	820×10^6	570
0.02	400×10^6	280
0.1	120×10^6	80
0.5	43×10^6	30
1.0	26×10^6	18
2.5	29×10^6	20
5.0	26×10^6	18
7.5	24×10^6	17
10	24×10^6	17
10 to 30	14×10^6	10

(h) For determining exposures to X- or gamma rays up to 3 Mev., the dose limits specified in this part may be assumed to be equivalent to the "air dose". For the purpose of this subpart "air dose" means that the dose is measured by a properly calibrated appropriate instrument in air at or near the body surface in the region of the highest dosage rate.

§ 50-204.21 Exposure of individuals to radiation in restricted areas.

(a) Except as provided in paragraph (b) of this section, no employer shall possess, use, or transfer sources of ionizing radiation in such a manner as to

cause any individual in a restricted area to receive in any period of one calendar quarter from sources in the employer's possession or control a dose in excess of the limits specified in the following table:

	Rems per calendar quarter
1. Whole body: Head and trunk; active blood-forming organs; lens of eyes; or gonads	1¼
2. Hands and forearms; feet and ankles	18¾
3. Skin of whole body	7½

(b) An employer may permit an individual in a restricted area to receive doses to the whole body greater than those permitted under paragraph (a) of this section, so long as:

(1) During any calendar quarter the dose to the whole body shall not exceed 3 rems; and

(2) The dose to the whole body, when added to the accumulated occupational dose to the whole body, shall not exceed 5 (N-18) rems, where "N" equals the individual's age in years at his last birthday; and

(3) The employer maintains adequate past and current exposure records which show that the addition of such a dose will not cause the individual to exceed the amount authorized in this paragraph. As used in this paragraph "Dose to the whole body" shall be deemed to include any dose to the whole body, gonad, active blood-forming organs, head and trunk, or lens of the eye.

(c) No employer shall permit any employee who is under 18 years of age to receive in any period of one calendar quarter a dose in excess of 10 percent of the limits specified in the table in paragraph (a) of this section.

(d) "Calendar quarter" means any 3-month period determined as follows:

(1) The first period of any year may begin on any date in January: *Provided,* That the second, third, and fourth periods accordingly begin on the same date in April, July, and October, respectively, and that the fourth period extends into January of the succeeding year, if necessary to complete a 3-month quarter. During the first year of use of this method of determination, the first period for that year shall also include any additional days in January preceding the starting date for the first period; or

(2) The first period in a calendar year of 13 complete, consecutive calendar weeks; the second period in a calendar year of 13 complete, consecutive calendar weeks; the third period in a calendar year of 13 complete, consecutive calendar weeks; the fourth period in a calendar year of 13 complete, consecutive calendar weeks. If at the end of a calendar year there are any days not falling within a complete calendar week of that year, such days shall be included within the last complete calendar week of that year. If at the beginning of any calendar year there are days not falling within a complete calendar week of that year, such days shall be included within the last complete calendar week of the previous year; or

(3) The four periods in a calendar year may consist of the first 14 complete, consecutive calendar weeks; the next 12 complete, consecutive calendar weeks, the next 14 complete, consecutive calendar weeks, and the last 12 complete, consecutive calendar weeks. If at the end of a calendar year there are any days not falling within a complete calendar week of that year, such days shall be included (for purposes of this part) within the last complete calendar week of the year. If at the beginning of any calendar year there are days not falling within a complete calendar week of that year, such days shall be included (for purposes of this part) within the last complete week of the previous year.

(e) No employer shall change the method used by him to determine calendar quarters except at the beginning of a calendar year.

§ 50-204.22 Exposure to airborne radioactive material.

(a) No employer shall possess, use or transport radioactive material in such a manner as to cause any employee, within a restricted area, to be exposed to airborne radioactive material in an average concentration in excess of the limits specified in Table I of Appendix B to 10 CFR Part 20. The limits given in Table I are for exposure to the concentrations specified for 40 hours in any workweek of 7 consecutive days. In any such period where the number of hours of exposure is less than 40,

the limits specified in the table may be increased proportionately. In any such period where the number of hours of exposure is greater than 40, the limits specified in the table shall be decreased proportionately.

(b) No employer shall possess, use, or transfer radioactive material in such a manner as to cause any individual within a restricted area, who is under 18 years of age to be exposed to airborne radioactive material in an average concentration in excess of the limits specified in Table II of Appendix B to 10 CFR Part 20. For purposes of this paragraph, concentrations may be averaged over periods not greater than 1 week.

(c) "Exposed" as used in this section means that the individual is present in an airborne concentration. No allowance shall be made for the use of protective clothing or equipment, or particle size, except as authorized by the Director, Bureau of Labor Standards.

§ 50-204.23 Precautionary procedures and personnel monitoring.

(a) Every employer shall make such surveys as may be necessary for him to comply with the provisions in this subpart. "Survey" means an evaluation of the radiation hazards incident to the production, use, release, disposal, or presence of radioactive materials or other sources of radiation under a specific set of conditions. When appropriate, such evaluation includes a physical survey of the location of materials and equipment, and measurements of levels of radiation or concentrations of radioactive material present.

(b) Every employer shall supply appropriate personnel monitoring equipment, such as film badges, pocket chambers, pocket dosimeters, or film rings, to, and shall require the use of such equipment by:

(1) Each employee who enters a restricted area under such circumstances that he receives, or is likely to receive, a dose in any calendar quarter in excess of 25 percent of the applicable value specified in paragraph (a) of § 50-204.21; and

(2) Each employee under 18 years of age who enters a restricted area under such circumstances that he receives, or is likely to receive, a dose in any calendar quarter in excess of 5 percent of the applicable value specified in paragraph (a) of § 50-204.21; and

(3) Each employee who enters a high radiation area.

(c) As used in this subpart:

(1) "Personnel monitoring equipment" means devices designed to be worn or carried by an individual for the purpose of measuring the dose received (e.g., film badges, pocket chambers, pocket dosimeters, film rings, etc.);

(2) "Radiation area" means any area, accessible to personnel, in which there exists radiation at such levels that a major portion of the body could receive in any one hour a dose in excess of 5 millirem, or in any 5 consecutive days a dose in excess of 100 millirem; and

(3) "High radiation area" means any area, accessible to personnel, in which there exists radiation at such levels that a major portion of the body could receive in any one hour a dose in excess of 100 millirem.

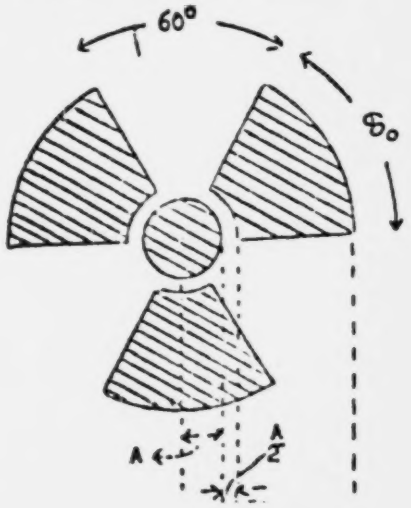
§ 50-204.24 Caution signs, labels, and signals.

(a) *General.* (1) Symbols prescribed by this section shall use the conventional radiation caution colors (magenta or purple on yellow background). The symbol prescribed by this section is the conventional three-bladed design:

RADIATION SYMBOL

1. Cross-hatched area is to be magenta or purple.

2. Background is to be yellow.



(2) In addition to the contents of signs and labels prescribed in this section, employers may provide on or near such signs and labels any additional information which may be appropriate in aiding individuals to minimize exposure to radiation or to radioactive material.

(b) *Radiation areas.* Each radiation area shall be conspicuously posted with a sign or signs bearing the radiation caution symbol and the words:

CAUTION [2]

RADIATION AREA

(c) *High radiation area.* (1) Each high radiation area shall be conspicuously posted with a sign or signs bearing the radiation caution symbol and the words:

CAUTION [2]

HIGH RADIATION AREA

(2) Each high radiation area shall be equipped with a control device which shall either cause the level of radiation to be reduced below that at which an individual might receive a dose of 100 millirems in 1 hour upon entry into the area or shall energize a conspicuous visible or audible alarm signal in such a manner that the individual entering and the employer or a supervisor of the activity are made aware of the entry. In the case of a high radiation area established for a period of 30 days or less, such control device is not required.

(d) *Airborne radioactivity area.* (1) As used in the provisions of this subpart, "airborne radioactivity area" means (i) any room, enclosure, or operating area in which airborne radioactive materials, composed wholly or partly of radioactive material, exist in concentrations in excess of the amounts specified in column 1 of Table 1 of Appendix B to 10 CFR Part 20 or (ii) any room, enclosure, or operating area in which airborne radioactive materials exist in concentrations which, averaged over the number of hours in any week during which individuals are in the area, exceed 25 percent of the amounts specified in column 1 of the described Table 1.

(2) Each airborne radioactivity area shall be conspicuously posted with a sign or signs bearing the radiation caution symbol and the words:

CAUTION [2]

AIRBORNE RADIOACTIVITY AREA

(e) *Additional requirements.* (1) Each area or room in which radioactive material is used or stored and which contains any radioactive material (other than natural uranium or thorium) in any amount exceeding 10 times the quantity of such material specified in Appendix C to 10 CFR Part 20 shall be conspiciously posted with a sign or signs bearing the radiation caution symbol and the words:

CAUTION [2]

RADIOACTIVE MATERIALS

(2) Each area or room in which natural uranium or thorium is used or stored in an amount exceeding 100 times the quantity specified in Appendix C to 10 CFR Part 20 shall be conspicuously posted with a sign or signs bearing the radiation caution symbol and the words:

CAUTION [2]

RADIOACTIVE MATERIALS

(f) *Containers.* (1) Each container in which is transported, stored, or used a quantity of any radioactive material (other than natural uranium or thorium) greater than the quantity of such material specified in Appendix C to 10 CFR Part 20 shall bear a durable, clearly visible label bearing the radiation caution symbol and the words:

CAUTION [2]

RADIOACTIVE MATERIALS

(2) Each container in which natural uranium or thorium is transported, stored, or used in a quantity greater than 10 times the quantity specified in Appendix C to 10 CFR Part 20 shall bear a durable, clearly visible label bearing the radiation caution symbol and the words:

[2] Or "Danger".

CAUTION [2]

RADIOACTIVE MATERIALS

(3) Notwithstanding the provisions of paragraphs (f) (1) and (2) of this section a label shall not be required:

(i) If the concentration of the material in the container does not exceed that specified in column 2 of the described Table 1, or

(ii) For laboratory containers, such as beakers, flasks, and tests tubes, used transiently in laboratory procedures, when the user is present.

(4) Where containers are used for storage, the labels required in this paragraph shall state also the quantities and kinds of radioactive materials in the containers and the date of measurement of the quantities.

§ 50-204.25 Exceptions from posting requirements.

Notwithstanding the provisions of § 50-204.24:

(a) A room or area is not required to be posted with a caution sign because of the presence of a sealed source, provided the radiation level 12 inches from the surface of the source container or housing does not exceed 5 millirem per hour.

(b) Rooms or other areas in on-site medical facilities are not required to be posted with caution signs because of the presence of patients containing radioactive material, provided that there are personnel in attendance who shall take the precautions necessary to prevent the exposure of any individual to radiation or radioactive material in excess of the limits established in the provisions of this subpart.

(c) Caution signs are not required to be posted at areas or rooms containing radioactive materials for periods of less than 8 hours: *Provided*, That (1) the materials are constantly attended during such periods by an individual who shall take the precautions necessary to prevent the exposure of any individual to radiation or radioactive materials in excess of the limits established in the provisions of this subpart; and (2) such area or room is subject to the employer's control.

[2] Or "Danger".

§ 50-204.26 Exemptions for radioactive materials packaged for shipment.

Radioactive materials packaged and labeled in accordance with regulations of the Department of Transportation shall be exempt from the labeling and posting requirements during shipment, provided that the inside containers are labeled in accordance with the provisions of § 50-204.24.

§ 50-204.27 Instruction of personnel posting.

Employers regulated by the AEC shall be governed by "§ 20.206" (10 CFR Part 20) standards. Employers in a State named in § 50-204.34(c) shall be governed by the requirements of the laws and regulations of that State. All other employers shall be regulated by the following:

(a) All individuals working in or frequenting any portion of a radiation area shall be informed of the occurrence of radioactive materials or of radiation in such portions of the radiation area; shall be instructed in the safety problems associated with exposure to such materials or radiation and in precautions or devices to minimize exposure; shall be instructed in the applicable provisions of this subpart for the protection of employees from exposure to radiation or radioactive materials; and shall be advised of reports of radiation exposure which employees may request pursuant to the regulations in this part.

(b) Each employer to whom this subpart applies shall post a current copy of its provisions and a copy of the operating procedures applicable to the work under contract conspicuously in such locations as to ensure that employees working in or frequenting radiation areas will observe these documents on the way to and from their place of employment, or shall keep such documents available for examination of employees upon request.

§ 50-204.28 Storage of radioactive materials.

Radioactive materials stored in a nonradiation area shall be secured against unauthorized removal from the place of storage.

§ 50-204.29 Waste disposal.

No employer shall dispose of radioactive material except by transfer to an authorized recipient, or in a manner approved by the Atomic Energy Commission or a State named in § 50-204.34(c).

§ 50-204.30 Notification of incidents.

(a) *Immediate notification.* Each employer shall immediately notify the Regional Director of the appropriate Wage and Labor Standards Administration, Office of Occupational Safety of the Bureau of Labor Standards of the U.S. Department of Labor, for employees not protected by AEC by means of 10 CFR Part 20, § 50-204.34(b) of this part, or the requirements of the laws and regulations of States named in § 50-204.34(c), by telephone or telegraph of any incident involving radiation which may have caused or threatens to cause:

(1) Exposure of the whole body of any individual to 25 rems or more of radiation; exposure of the skin of the whole body of any individual to 150 rems or more of radiation; or exposure of the feet, ankles, hands, or forearms of any individual to 375 rems or more of radiation; or

(2) The release of radioactive material in concentrations which, if averaged over a period of 24 hours, would exceed 5,000 times the limit specified for such materials in Table II of Appendix B to 10 CFR Part 20.

(3) A loss of 1 working week or more of the operation of any facilities affected; or

(4) Damage to property in excess of $100,000.

(b) *Twenty-four hour notification.* Each employer shall within 24 hours following its occurrence notify the Regional Director of the appropriate Wage and Labor Standards Administration, Office of Occupational Safety of the Bureau of Labor Standards of the U.S. Department of Labor, for employees not protected by AEC by means of 10 CFR Part 20, § 50-204.34(b) of this part, or the requirements of the laws and applicable regulations of States named in § 50-204.34(c), by telephone or telegraph of any incident involving radiation which may have caused or threatens to cause:

(1) Exposure of the whole body of any individual to 5 rems or more of radiation; exposure of the skin of the whole body of any individual to 30 rems or more of radiation; or exposure of the feet, ankles, hands, or forearms to 75 rems or more of radiation; or

(2) A loss of 1 day or more of the operation of any facilities; or

(3) Damage to property in excess of $10,000.

§ 50-204.31 Reports of overexposure and excessive levels and concentrations.

(a) In addition to any notification required by § 50-204.30 each employer shall make a report in writing within 30 days to the Regional Director of the appropriate Wage and Labor Standards Administration, Office of Occupational Safety of the Bureau of Labor Standards of the U.S. Department of Labor, for employees not protected by AEC by means of 10 CFR Part 20, or under § 50-204.34(b) of this part, or the requirements of the laws and regulations of States named in § 50-204.34(c), of each exposure of an individual to radiation or concentrations of radioactive material in excess of any applicable limit in this subpart. Each report required under this paragraph shall describe the extent of exposure of persons to radiation or to radioactive material; levels of radiation and concentrations of radioactive material involved, the cause of the exposure, levels of concentrations; and corrective steps taken or planned to assure against a recurrence.

(b) In any case where an employer is required pursuant to the provisions of this section to report to the U.S. Department of Labor any exposure of an individual to radiation or to concentrations of radioactive material, the employer shall also notify such individual of the nature and extent of exposure. Such notice shall be in writing and shall contain the following statement: "You should preserve this report for future reference."

§ 50-204.32 Records.

(a) Every employer shall maintain records of the radiation exposure of

all employees for whom personnel monitoring is required under § 50-204.23 and advise each of his employees of his individual exposure on at least an annual basis.

(b) Every employer shall maintain records in the same units used in tables in § 50-204.21 and Appendix B to 10 CFR Part 20.

§ 50-204.33 Disclosure to former employee of individual employee's record.

(a) At the request of a former employee an employer shall furnish to the employee a report of the employee's exposure to radiation as shown in records maintained by the employer pursuant to § 50-204.32(a). Such report shall be furnished within 30 days from the time the request is made, and shall cover each calendar quarter of the individual's employment involving exposure to radiation or such lesser period as may be requested by the employee. The report shall also include the results of any calculations and analysis of radioactive material deposited in the body of the employee. The report shall be in writing and contain the following statement: "You should preserve this report for future reference."

(b) The former employee's request should include appropriate identifying data, such as social security number and dates and locations of employment.

§ 50-204.34 AEC licensees—AEC contractors operating AEC plants and facilities—AEC agreement State licensees or registrants.

(a) Any employer who possesses or uses source material, byproduct material, or special nuclear material, as defined in the Atomic Energy Act of 1954, as amended, under a license issued by the Atomic Energy Commission and in accordance with the requirements of 10 CFR Part 20 shall be deemed to be in compliance with the requirements of this subpart with respect to such possession and use.

(b) AEC contractors operating AEC plants and facilities: Any employer who possesses or uses source material, byproduct material, special nuclear material, or other radiation sources under a contract with the Atomic Energy Commission for the operation of AEC plants and facilities and in accordance with the standards, procedures, and other requirements for radiation protection established by the Commission for such contract pursuant to the Atomic Energy Act of 1954 as amended (42 U.S.C. 2011 et seq.), shall be deemed to be in compliance with the requirements of this subpart with respect to such possession and use.

(c) AEC-agreement State licensees or registrants:

(1) *Atomic Energy Act Sources.* Any employer who possesses or uses source material, byproduct material, or special nuclear material, as defined in the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.), and has either registered such sources with, or is operating under a license issued by, a State which has an agreement in effect with the Atomic Energy Commission pursuant to section 274(b) (42 U.S.C. 2021(b)) of the Atomic Energy Act of 1954, as amended, and in accordance with the requirements of that State's laws and regulations shall be deemed to be in compliance with the radiation requirements of this part, insofar as his possession and use of such material is concerned, unless the Secretary of Labor, after conference with the Atomic Energy Commission, shall determine that the State's program for control of these radiation sources is incompatible with the requirements of this part. Such agreements currently are in effect only in the States of Alabama, Arkansas, California, Kansas, Kentucky, Florida, Mississippi, New Hampshire, New York, North Carolina, Texas, Tennessee, Oregon, Idaho, Arizona, Colorado, Louisiana, Nebraska, and Washington.

(2) *Other sources.* Any employer who possesses or uses radiation sources other than source material, byproduct material, or special nuclear material, as defined in the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.), and has either registered such sources with, or is operating under a license issued by a State which has an agreement in effect with the Atomic Energy Commission pursuant to section 274(b) (42 U.S.C. 2021(b)) of the Atomic Energy Act of 1954, as amend-

ed, and in accordance with the requirements of that State's laws and regulations shall be deemed to be in compliance with the radiation requirements of this part, insofar as his possession and use of such material is concerned, provided the State's program for control of these radiation sources is the subject of a currently effective determination by the Secretary of Labor that such program is compatible with the requirements of this part. Such determinations currently are in effect only in the States of Alabama, Arkansas, California, Kansas, Kentucky, Florida, Mississippi, New Hampshire, New York, North Carolina, Texas, Tennessee, Oregon, Idaho, Arizona, Colorado, Louisiana, Nebraska, and Washington.

§ 50-204.35 Application for variations from radiation levels.

(a) In accordance with policy expressed in the Federal Radiation Council's memorandum concerning radiation protection guidance for Federal agencies (25 FR 4402), the Director, Bureau of Labor Standards may from time to time grant permission to employers to vary from the limitations contained in §§ 50-204.21 and 50-204.22 when the extent of variation is clearly specified and it is demonstrated to his satisfaction that (1) such variation is necessary to obtain a beneficial use of radiation or atomic energy, (2) such benefit is of sufficient value to warrant the variation, (3) employees will not be exposed to an undue hazard, and (4) appropriate actions will be taken to protect the health and safety of such employees.

(b) Applications for such variations should be filed with the Director, Bureau of Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

§ 50-204.36 Radiation standards for mining.

(a) For the purpose of this section, a "working level" is defined as any combination of radon daughters in 1 liter of air which will result in the ultimate emission of 1.3 x 10^5 million electron volts of potential alpha energy. The numerical value of the "working level" is derived from the alpha energy released by the total decay of short-lived radon daughter products in equilibrium with 100 pico-curies of radon 222 per liter of air. A working level month is defined as the exposure received by a worker breathing air at one working level concentration for 4⅓ weeks of 40 hours each.

(b)(1) Occupational exposure to radon daughters in mines shall be controlled so that no individual will receive an exposure of more than 2 working level months in any calendar quarter and no more than 4 working level months in any calendar year. Actual exposures shall be kept as far below these values as practicable.

(2) In enforcing this section, the Director of the Bureau of Labor Standards may at any stage approve variations in individual cases from the limitation set forth in paragraph (b)(1) of this section to comply with the requirements of the Act upon a showing to the satisfaction of the Director by an employer having a mine with conditions resulting in an exposure of more than 4 working level months but not more than 12 working level months in any 12 consecutive months that (i) under the particular facts and circumstances involved the working conditions of the employees so exposed are such that their health and safety are protected, and (ii) the employer has a bona fide plan to reduce the levels of exposure to those specified in paragraph (b)(1) of this section as soon as practicable, but in no event later than January 1, 1971.

(3) Whenever a variation under paragraph (b)(2) of this section is sought, a request therefor should be submitted in writing to the Director of the Bureau of Labor Standards, U.S. Department of Labor, Washington, D.C. 20210, within 90 days following the end of the calendar quarter or year, as the case may be.

(c)(1) For uranium mines, records of environmental concentrations in the occupied parts of the mine, and of the time spent in each area by each person involved in underground work shall be established and maintained. These records shall be in sufficient detail to permit calculations of the exposures, in units of working level months, of the individuals and shall be available

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for inspection by the Secretary of Labor or his authorized agents.

(2) For other than uranium mines and for surface workers in all mines, paragraph (c)(1) of this section will be applicable: *Provided, however,* That if no environmental sample shows a concentration greater than 0.33 working level in any occupied part of the mine, the maintenance of individual occupancy records and the calculation of individual exposures will not be required.

(d)(1) At the request of an employee (or former employee) a report of the employee's exposure to radiation as shown in records maintained by the employer pursuant to paragraph (c) of this section, shall be furnished to him. The report shall be in writing and contain the following statement:

This report is furnished to you under the provisions of the U.S. Department of Labor, Radiation Safety and Health Standards (41 CFR 50-204.36). You should preserve this report for future reference.

(2) The former employee's request should include appropriate identifying data, such as social security number and dates and locations of employment.

Subpart D—Gases, Vapors, Fumes, Dusts, and Mists

§ 50-204.50 Gases, vapors, fumes, dusts, and mists.

(a) (1) Exposures by inhalation, ingestion, skin absorption, or contact to any material or substance (i) at a concentration above those specified in the "Threshold Limit Values of Airborne Contaminants for 1968" of the American Conference of Governmental Industrial Hygienists, except for the ANSI Standards listed in Table I of this section and except for the values of mineral dusts listed in Table II of this section, and (ii) concentrations above those specified in Tables I and II of this section, shall be avoided, or protective equipment shall be provided and used.

(2) The requirements of this section do not apply to exposures to airborne asbestos dust. Exposures of employees to airborne asbestos dust shall be subject to the requirements of 29 CFR 1910.93a.

(b) To achieve compliance with paragraph (a) of this section, feasible administrative or engineering controls must first be determined and implemented in all cases. In cases where protective equipment in addition to other measures is used as the method of protecting the employee, such protection must be approved for each specific application by a competent industrial hygienist or other technically qualified source.

TABLE II—Mineral Dusts

Substance	Mppcf[e]	Mg/M³
Silica:		
Crystalline:		
Quartz (respirable)	250[f]	10mg/M³[m]
	%SiO_2+5	%SiO_2+2
Quartz (total dust)		30mg/M³
		%SiO_2+2
Cristobalite: Use ½ the value calculated from the count or mass formulae for quartz.		
Tridymite: Use ½ the value calculated from the formulae for quartz.		
Amorphous, including natural diatomaceous earth	20	80mg/M³
		%SiO_2
Silicates (less than 1% crystalline silica):		
Mica	20	
Soapstone	20	
Talc	20	
Portland cement	50	
Graphite (natural)	15	
Coat dust (respirable fraction less than 5% SiO_2)		2.4mg/M³
		or
For more than 5% SiO_2		10mg/M³
		%SiO_2+2
Inert or Nuisance Dust:		
Respirable fraction	1	5mg/M³
Total dust	505	15mg/M³

NOTE: Conversion factors—
mppcf × 35.3 = million particles per cubic meter
= particles per c.c.

[e] Millions of particles per cubic foot of air, based on impinger samples counted by light-field technics.

[f] The percentage of crystalline silica in the formula is the amount determined from air-borne samples, except in those instances in which other methods have been shown to be applicable.

[m] As determined by the membrane filter method at 430 × phase contrast magnification.

[m] Both concentration and percent quartz for the application of this limit are to be determined from the fraction passing a size-selector with the following characteristics:

BEST DOCUMENT AVAILABLE

Aerodynamic diameter (unit density sphere)	Percent passing selector
2	90
2.5	75
3.5	50
5.0	25
10	0

The measurements under this note refer to the use of an AEC instrument. If the respirable fraction of coal dust is determined with a MRE the figure corresponding to that of 2.4 Mg/M^3 in the table for coal dust is 4.5 Mg/M^3.

[36 FR 23217, Dec. 7, 1971]

§ 50-204.65 Inspection of compressed gas cylinders.

Each contractor shall determine that compressed gas cylinders under his extent that this can be determined by visual inspection. Visual and other inspections shall be conducted as prescribed in the Hazardous Materials Regulations of the Department of Transportation (49 CFR Parts 171-179 and 14 CFR Part 103). Where those regulations are not applicable, visual and other inspections shall be conducted in accordance with Compressed Gas Association Pamphlets C-6-198 and C-8-1962.

§ 50-204.66 Acetylene.

(a) The in-plant transfer, handling, storage, and utilization of acetylene in cylinders shall be in accordance with Compressed Gas Association Pamphlet G-1-1966.

(b) The piped systems for the in-plant transfer and distribution of acetylene shall be designed, installed, maintained, and operated in accordance with Compressed Gas Association Pamphlet G-1.3-1959.

(c) Plants for the generation of acetylene and the charging (filling) of acetylene cylinders shall be designed, constructed, and tested in accordance with the standards prescribed in Compressed Gas Association Pamphlet G-1.4-1966.

§ 50-204.67 Oxygen.

The in-plant transfer, handling, storage, and utilization of oxygen as a liquid or a compressed gas shall be in accordance with Compressed Gas Association Pamphlet G-4-1962.

§ 50-204.68 Hydrogen.

The in-plant transfer, handling, storage, and utilization of hydrogen shall be in accordance with Compressed Gas Association Pamphlets G-5.1-1961 and G-5.2-1966.

§ 50-204.69 Nitrous oxide.

The piped systems for the in-plant transfer and distribution of nitrous oxide shall be designed, installed, maintained, and operated in accordance with Compressed Gas Association Pamphlet G-8.1-1964.

§ 50-204.70 Compressed gases.

The in-plant handling, storage, and utilization of all compressed gases in cylinders, portable tanks, rail tankcars, or motor vehicle cargo tanks shall be in accordance with Compressed Gas Association Pamphlet P-1-1965.

[35 FR 1015, Jan. 24, 1970]

§ 50-204.71 Safety relief devices for compressed gas containers.

Compressed gas cylinders, portable tanks, and cargo tanks shall have pressure relief devices installed and maintained in accordance with Compressed Gas Association Pamphlets S-1.1-1963 and 1965 addenda and S-1.2-1963.

§ 50-204.72 Safe practices for welding and cutting on containers which have held combustibles.

Welding or cutting, or both, on containers which have held flammable or combustible solids, liquids, or gases, or have contained substances which may produce flammable vapors or gases will not be attempted until the containers have been thoroughly cleaned, purged, or inerted in strict accordance with the rules and procedures embodied in American Welding Society Pamphlet A-6.0-65, edition of 1965.

[35 FR 1015, Jan. 24, 1970]

Subpart E—Transportation Safety

§ 50-204.75 Transportation safety.

Any requirements of the U.S. Department of Transportation under 49 CFR Parts 171-179 and Parts 390-

397 and 14 CFR Part 103 shall be applied to transportation under contracts which are subject to the Walsh-Healey Public Contracts Act. See also § 50-204.2(a)(3) of this part. When such requirements are not otherwise applicable, Chapters 10, 11, 12, and 14 of the Uniform Vehicle Code of the National Committee on Uniform Traffic Laws and Ordnances, 1962 edition, shall be applied whenever pertinent.

[35 FR 1016, Jan. 24, 1970]

PART 50-205—ENFORCEMENT OF SAFETY AND HEALTH STANDARDS BY STATE OFFICERS AND EMPLOYEES

Sec.

50-205.1 Purpose and scope.
50-205.2 Definitions.
50-205.3 Agreement with a State agency.
50-205.4 Plan of cooperation.
50-205.5 Inspections by State agency.
50-205.6 Complaints.
50-205.7 Manual of instructions.
50-205.8 Reports of inspections.
50-205.9 Inspections by the Department of Labor.
50-205.10 Modification or termination of agreement.

AUTHORITY: Sec. 4, 49 Stat. 2038, 41 U.S.C. 38. Interpret or apply sec. 1, 49 Stat. 2036, 41 U.S.C. 35, unless otherwise noted.

SOURCE: 27 FR 1270, Feb. 10, 1962, unless otherwise noted.

§ 50-205.1 Purpose and scope.

The Walsh-Healey Public Contracts Act authorizes and directs the Secretary of Labor to utilize, with the consent of a State, such State and local officers and employees as he may find necessary to assist in the administration of the Act. It is the purpose of this part to prescribe the rules governing the use of such State and local officers in inspections (or investigations) relating to the enforcement of the stipulation required by the Act providing that no part of a contract subject thereto will be performed nor will any materials, supplies, articles, or equipment to be manufactured or furnished under such a contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract, and the enforcement of the safety and health standards interpreting and applying that stipulation published in Part 50-204 of this chapter.

§ 50-205.2 Definitions.

(a) "Act" means the Walsh-Healey Public Contracts Act.

(b) "Secretary" means the Secretary of Labor.

(c) "State agency" means any authority of a State government which is responsible for the enforcement of State laws or regulations prescribing safety and health standards for employees.

(d) "Director" means the Director, Bureau of Labor Standards or his duly authorized representative.

(41 U.S.C. 40; 5 U.S.C. 556)

[27 FR 1270, Feb. 10, 1962, as amended at 32 FR 7704, May 26, 1967]

§ 50-205.3 Agreement with a State agency.

The Secretary may enter into an agreement with the head of a State agency providing for the use of State or local officers and employees in the conduct of inspections under the safety and health provisions of the Act as interpreted or applied in Part 50-204 of this chapter whenever he finds that the utilization of such State or local officers is necessary to assist in the administration of those provisions. In making such a finding, consideration may be given to the State laws or regulations administered by the State agency providing safety and health standards, the central and field organization of the State agency, and the qualifications of its investigative personnel.

§ 50-205.4 Plan of cooperation.

Each agreement under this part shall incorporate a plan of cooperation between the Department of Labor and the State agency. The plan shall include the operative details of the cooperation contemplated in the making of safety and health inspections. The plan shall include a statement of the location of the State offices designated to make inspections and those of

the Department of Labor designated to cooperate with such State offices.

§ 50-205.5 Inspections by State agency.

Inspections shall be conducted by the State agency with whom an agreement has been made under this part in order to determine the extent of compliance by Government contractors subject to the Act (as determined by the Department of Labor) with the safety and health provisions interpreted or applied in Part 50-204 of this chapter. Inspectors of the State agency shall be considered authorized representatives of the Secretary of Labor in making inspections including the examining of the records of the Government contractor maintained under §§ 50-201.501 and 50-201.502 of this chapter. Inspections shall be made upon request of the Department of Labor or concurrently with inspections made to ascertain the compliance by employers with State safety and health requirements.

§ 50-205.6 Complaints.

When a complaint of alleged safety and health violations by an employer apparently subject to the Act is filed with a State agency, that agency shall transmit a copy of the complaint to the cooperating office of the Department of Labor within 5 days from the receipt of the complaint. All complaints shall be considered confidential and shall not be disclosed to any employer without the consent of the complainant.

§ 50-205.7 Manual of instructions.

The Director shall provide the State agency with a manual of instructions which shall be used in the making of inspections.

(41 U.S.C. 40; 5 U.S.C. 556)

[32 FR 7704, May 26, 1967]

§ 50-205.8 Reports of inspections.

The State agency shall furnish the Department of Labor with a report of its inspection when the following circumstances exist:

(a) The inspection was requested by the Department of Labor;

(b) The inspection discloses serious violations of the safety and health requirements of Part 50-204 of this chapter by an employer apparently subject to the Act;

(c) The inspection discloses minor violations of the safety and health requirements of Part 50-204 of this chapter by an employer apparently subject to the Act which are not corrected promptly when such apparent violations are brought to the attention of the employer or as to which fully reliable assurances of future compliance are not or cannot be obtained.

§ 50-205.9 Inspections by the Department of Labor.

The Director may conduct such inspections as he may find appropriate to assure compliance with the safety and health provisions of the Act or whenever he may find that a safety and health inspection should be carried out along with investigation under other provisions of the Act or the Fair Labor Standards Act of 1938. Whenever an inspection by the Director discloses apparent violations of State safety and health requirements, the Director shall report such disclosures to the State agency.

(41 U.S.C. 40; 5 U.S.C. 556)

[32 FR 7704, May 26, 1967]

§ 50-205.10 Modification or termination of agreement.

Any agreement entered into this part may be modified at any time with the consent of both parties, and may be terminated by either party after notifying the other party 60 days prior thereto.

PART 50-206—THE WALSH-HEALEY PUBLIC CONTRACTS ACT INTERPRETATIONS

Subpart A—General

Sec.

50-206.1 The Walsh-Healey Public Contracts Act.
50-206.2 Administration of the Act.
50-206.3 Purpose and scope of this part.

Subpart B—[Reserved]

Subpart C—Contractors

QUALIFICATIONS OF CONTRACTORS

Sec.

50-206.50 To whom covered contracts may be awarded—eligibility.
50-206.51 Manufacturer.
50-206.52 Assembler.
50-206.53 Regular dealer.
50-206.54 Regular dealer in particular products.
50-206.55 Agents.
50-206.56 Administrative exemptions.

AUTHORITY: Sec. 4, 49 Stat. 2038, 41 U.S.C. 38, Secretary of Labor's Order No. 16-75, 40 FR 55913, and Employment Standards Order 2-76, 41 FR 9016.

SOURCE: 43 FR 22975, May 30, 1978, unless otherwise noted.

Subpart A—General

§ 50-206.1 The Walsh-Healey Public Contracts Act.

The Walsh-Healey Public Contracts Act, as amended (41 U.S.C. 35-45), hereinafter referred to as the Act, was enacted "to provide conditions for the purchase of supplies and the making of contracts by the United States." It is not an act of general applicability to industry. The Supreme Court has described it as an instruction by the Government to its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. Its purpose, according to the Supreme Court "was to impose obligations upon those favored with Government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment." ("Perkins v. Lukens Steel Co.," 310 U.S. 113, 128 (1940); "Endicott Johnson Corp. v. Perkins," 317 U.S. 501 (1943).) To this end, the Act requires those who enter into contracts to perform Government work subject to its terms to adhere to specifically prescribed representations and stipulations as set forth in 41 CFR 50-201.1 pertaining to qualifications of contractors, minimum wages, overtime pay, safe and sanitary working conditions of workers employed on the contract, the use of child labor or convict labor on the contract work, and the enforcement of such provisions. Except as otherwise specifically provided, these representations and stipulations are required to be included in every contract "for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000" which is made and entered into by an agency of the United States or other entity as designated in section 1 of the Act, hereinafter referred to as "contracting agency." Contractors performing work subject to the Act thus "enter into competition to obtain Government business on terms of which they are fairly forwarned by inclusion in the contract." ("Endicott Johnson Corp. v. Perkins, supra," 317 U.S. at 507.) The Act also provides for enforcement of the required representations and stipulations by various methods. Certain exemptions from the application of the Act are provided in section 9 of the statute. Other exemptions, variations, and tolerances may be provided under section 6 of the statute by the Secretary of Labor or the President.

§ 50-206.2 Administration of the Act.

(a) The Secretary of Labor is authorized and directed to administer the provisions of the Act, to make investigations, findings, and decisions thereunder, and to make, amend, and rescind rules and regulations with respect to its application (see sections 4 and 5). The Supreme Court has recognized that the Secretary may issue rulings defining the coverage of the Act. ("Endicott Johnson Corp. v. Perkins, supra".) According to the Court (ibid.), in the statute as originally enacted "Congress submitted the administration of the Act to the judgment of the Secretary of Labor, not to the judgment of the courts." An amendment to the Act in 1952 added specific provisions for judicial review (see section 10). The Secretary has promulgated regulations to carry out provisions of the Act, which are set forth elsewhere in this chapter (Part 50-201 (general regulations); Part 50-202 (minimum wage determinations); Part 50-203

(rules of practice); and Part 50-204 (Safety and Health Standards)). The Secretary of Labor has delegated to the Administrator of the Wage and Hour Division through the Assistant Secretary for Employment Standards the authority to promulgate regulations and to issue official rulings and interpretations. So long as such regulations, rulings, and interpretations are not modified, amended, rescinded, or determined by judicial authority to be incorrect, they may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U.S.C. 251, et seq., discussed in 29 CFR Part 790). Furthermore, these interpretations are intended to indicate the construction of the law which the Department of Labor believes to be correct and which will be followed in the administration of the Act unless and until directed otherwise by Act of Congress or by authoritative rulings of the courts. ("Skidmore v. Swift & Co.", 323 U.S. 134 (1944), "Roland Co. v. Walling", 326 U.S. 657 (1946); "Endicott Johnson Corp. v. Perkins, supra", and "Perkins v. Lukens Steel Co., supra".)

(b) The courts have held that the "interpretations of the Walsh-Healey Act and the regulations adopted thereunder, as made by the Secretary of Labor acting through his Administrator, are both correct and reasonable." ("Jno. McCall Coal Company v. United States," 374 F. 2d 689, 692 (C.A. 4, 1967); see also "United States v. Davison Fuel and Dock Company," 371 F. 2d 705, 711-714 (C.A. 4, 1967).) These policies are designed to protect not only employees but also the competitive interest of all firms qualified to compete for covered contracts.

§ 50-206.3 Purpose and scope of this part.

It is the purpose of this Part 50-206 to make available, in codified form for the guidance of agencies of the United States or other entities designed in section 1 of the Act and persons or firms contracting therewith, official rulings and interpretations with respect to the Walsh-Healey Public Contracts Act. This part constitutes the official statement of the position of the Department of Labor in matters relating to this Act. The interpretative rules herein stated supersede, to the extent of any inconsistency, Rulings and Interpretations No. 3 and all other rulings, interpretations, and enforcement policies not set forth in this chapter. This Part 50-206 illustrates the principles stated herein by showing their application to situations which frequently arise. Since it cannot include every possible situation, no inference should be drawn from the fact that a subject or illustration is omitted. If doubt arises, inquiries should be directed to the Administrator of the Wage and Hour Division, United States Department of Labor, Washington, D.C. 20210, or to any Regional Office of the Wage and Hour Division.

Subpart B—[Reserved]

Subpart C—Contractors

Qualifications of Contractors

§ 50-206.50 To whom covered contracts may be awarded—eligibility.

(a)(1) Section 1(a) of the Act requires that every contract subject to the Act shall contain a representation and stipulation by the contractor that it is either "the manufacturer of or a regular dealer in" the commodities to be manufactured or used in the performance of the contract. As noted in the following sections, these terms are defined by regulation. The legislative history makes it clear that this statutory requirement is intended, among other things, to eliminate the award of contracts to "bid brokers," and to provide labor standards protection for employees who actually engage in the manufacture or furnishing of the goods to the Government, by requiring, among other things, that the Government award contracts only to bona fide manufacturers or regular dealers. A breach of this required stipulation is a violation of the Act; however, a contractor who has been awarded a contract in spite of its failure to qualify as a manufacturer or regular dealer is not relieved of its obligation to comply with the other requirements of the Act and regulations, which are also contract stipulations.

(2) In implementing Section 1(a) of the Act, the Secretary of Labor has defined in 41 CFR 50-201.101 the terms "manufacturer" and "regular dealer" by stating the affirmative requirements that must be met by potential contractors before they may receive Government contracts subject to the Act. Every bid from any bidder who is not a manufacturer or regular dealer, as defined therein and in accordance with this subpart, must be rejected by the contracting officer. (See 41 CFR 50-201.101(a)(3)(i).)

(3) The provisions of 41 CFR 50-201.1 require that the representations and stipulations prescribed in section 1 of the Act must be included in invitations to bid and in contracts subject to the Act, either in full or by incorporation by reference. Since no qualifications may be placed on the required representations and stipulations, any bid which seeks to avoid full compliance with the Act by any qualification or reservation must be rejected. (See 16 Comp. Gen. 593.)

(b) The responsibility for applying the stated eligibility requirements in order to determine whether or not a bidder is qualified as a manufacturer or regular dealer before award rests in the first instance with the contracting agency pursuant to authority delegated by the Secretary of Labor in accordance with section 4 of the Act (Circular Letter 8-61), as detailed in § 50-201.101(b) of Part 50-201 of this chapter. It is the obligation of the contracting agencies to obtain and consider all factual evidence essential to eligibility determinations for all bidders in line for award of contracts subject to the Act.

§ 50-206.51 Manufacturer.

(a)(1) Section 50-201.101(a)(1) of Regulations 41 CFR Part 50-201, defines a manufacturer as a "person who owns, operates, or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications."

(2) Generally, there should be no question as to a bidder's eligibility. The bidder either has, or has not, the requisite plant, equipment and personnel to produce on its own premises the goods called for under the Government contract.

(b) A bidder who desires to qualify for an award as a manufacturer must show before the award that it is (1) an established manufacturer of the particular good or goods of the general character sought by the Government (i.e., that the bidder has a plant, equipment and personnel to manufacture on its own premises the goods called for under the contract) or (2) if the bidder is "newly entering" into such manufacturing activity that the bidder has made all necessary prior arrangements and definite commitments for (i) manufacturing space, (ii) equipment, and (iii) personnel to perform on its own premises the manufacturing operations required for the fulfillment of the contract. A new firm which, prior to the award of a contract, has made such definite prior arrangements and commitments in order to enter a manufacturing business which will qualify it should not be barred from receiving the award because it has not yet done any manufacturing, even if such arrangement and commitments are contingent upon the award of a Goverment contract. However, in order to meet the "definite commitment" test for "newly entering" firms, the bidder must have entered into written, legally binding arrangements and commitments prior to, even though contingent upon, award, under which the bidder would acquire for itself plant, equipment and personnel if awarded the Government contract. This would be evidence of a bona fide intent to establish a continuing manufacturing entity and, as such, to become an eligible manufacturer. This requirement is intended to exclude from eligibility bidders who make unsubstantiated assertions that they are eligible and then totally subcontract or broker the contract after award.

(c)(1) In general, such "newly entering" firm must show that the manufacturing activity in question is not one which has been set up solely to produce on a Government contract and whose operations will be terminated upon completion of that contract. In effect, the firm must have estab-

lished arrangements on a continuing basis for production of the goods desired by the Government.

(2) The documentation required to evidence prior arrangements and definite commitments will vary depending upon the facts and circumstances of the particular case. The contents and bona fides of all documentation and arrangements must be examined to determine if the spirit and intent of the Act and the regulations have been met. The following are examples of what the Department of Labor considers as sufficient evidence of all necessary prior arrangements and definite commitments:

(i) Manufacturing space can be either owned or leased by and in the name of the bidder. A recorded deed to the bidder's property in which the manufacturing is to take place, or a copy of a properly executed bona fide lease agreement clearly identifying the manufacturing space and setting forth the terms and conditions of the lease, would generally be considered evidence of prior arrangements and definite commitments for space. In addition, as noted above, any such lease agreement must be legally binding on the part of both parties to the agreement, the space must be for the exclusive and unrestricted use of the lessee, and the term of the lease must be of sufficient duration so that the bidder will be able to clearly fulfill the contract before the lease expires.

(ii)(A) The bidder must own or have made written, legally binding definite commitments to purchase or lease sufficient equipment to manufacture the goods, materials, or articles required for contract fulfillment. A bidder must have full, complete and unrestricted control of the necessary equipment. A bill of sale or a purchase order may evidence definite commitments for equipment. The general requirements with respect to a bill of sale or purchase order are that it be dated and signed by the bidder, specifically identifying and describing the equipment and the terms of payment for the equipment purchased or to be purchased, and containing the date by which the vendor delivered or is required to deliver the equipment.

(B) The vendor must provide written evidence of acceptance, such as a bill or invoice, acknowledging receipt of the purchase order, as written, and setting forth the terms of payment in accordance with prevailing business practice. Such documentation is normally associated with the consummation of a sale in the usual conduct of business transactions.

(C) Letters of intent for space and equipment or vendor quotations or offers to sell or lease space or equipment, or affidavit that a sale or conveyance has occurred, do not constitute legally binding contractual agreements or definite commitments.

(iii) The best evidence of available personnel is the presence on the payroll of the manufacturing employees necessary to fulfill the contract. However, affirmative evidence which the bidder submits showing what prior arrangements and definite commitments it has made to hire its own manufacturing personnel will be considered.

(d) A bidder's mere representation or affirmation that he is a qualified manufacturer or has fulfilled the above applicable conditions is insufficient. Evidence must be presented to the contracting agency which shows that these conditions are, in fact, met prior to any award of a contract subject to the Act. If it is discovered after an award that the bidder did not act in good faith by actually fulfilling these acquisition requirements, such contract award shall, in accordance with § 50-201.101(a)(3)(i)(A) immediately upon such discovery, be subject to termination by the contracting officer.

(e) The plain language of the Act and regulations makes it clear that covered contracts are to be awarded only to contractors who are currently capable of manufacturing on their premises the goods called for under the contract or who, if newly entering into manufacturing, have made binding commitments before award to enable them to produce such goods as discussed above. Thus, a bidder's arrangements to use, rent, or share the equipment, personnel, or space of another legal entity on a time and material or "as needed" basis do not constitute the making of all necessary prior arrangements or definite commit-

ments. (See "In re Metalcraft Mfg. Sale Corp.", 15 WH Cases 557, 566 (1962).) The Department has consistently held that the availability of the manufacturing and producing establishments of others does not qualify the contractor as a manufacturer as the term is defined herein. See, for example, "In re Electric Ventilating Corp.", 13 WH Cases 220, "In re Dimensional Displays", 12 WH Cases 847, and "In re Paramount Industries, Inc.", 11 WH Cases 721.

(f) Every bidder must qualify in its own right as a manufacturer under the Act. Therefore, all evidence documenting a bidder's eligibility must be in the name of the bidder. Arrangements or proposals for subcontracting, or a bidder's affiliation or relation with another firm, even one having the same officers or ownership, are not definite commitments nor are they evidence of the bidder's own eligibility as a manufacturer, even though such affiliate or subcontractor might be a qualified manufacturer. The fact that one legal entity may qualify as a manufacturer does not confer such status upon another legal entity. (See Decision of the Hearing Examiner, "In re Alden Industries, Inc.," PC-551, March 16, 1954; "In re Alsco Commercial Furniture Co., Inc.," PC-469, July 16, 1952.)

(g) A bidder's eligibility status on a previous Walsh-Healy contract or its performance as a subcontractor on Walsh-Healy contracts are not determinative evidence of the bidder's present eligibility as a manufacturer.

(h) Activities such as engineering, planning, design, inspection, quality control, testing, marking, packaging, and repackaging and shipping may be incidental, ancillary or necessary to manufacturing. Nevertheless, such operations are not, standing alone, or in combination, considered "manufacturing," i.e. fabrication or production. The proposed performance solely of such activities does not qualify a firm as a manufacturer.

§ 50-206.52 Assembler.

(a) As a result of changing technology in the area of manufacturing, the Department has concluded that it is now necessary to provide a fuller discussion of the standards that an assembler must meet to qualify as a manufacturer.

(b)(1) "Assembly" means piecing or bringing together various interdependent or interrelated parts or components so as to make an operable whole or unit. (Decision of the Comptroller General, B-164770, September 3, 1968 (not officially published).) A firm which produces final items on its premises by assembling component parts, all or some of which have been purchased from others, will generally be considered to be a "manufacturer" where it performs a series of assembly operations utilizing machines, tools and workers which constitute substantial and significant fabrication or production of the desired product. The qualifications of a bidder as a manufacturer who proposes to "assemble" must be decided on the basis of all the facts and circumstances surrounding a particular procurement.

(2) Thus, the determination of whether a bidder proposing to assemble a final product from component parts is an eligible manufacturer must rest on whether the bidder has demonstrated an independent ability, with its plant, equipment and personnel, to perform a significant or substantial portion of the manufacturing operations and efforts required in producing the final product for which the government contracted.

(3) In the alternative, a bidder may also qualify as a manufacturer if it has the facilities to produce on its premises a significant portion of the required component parts needed for the final product even if the bidder will only perform assembly operations under a particular procurement.

(c) Firms which only perform minimal operations upon the item being procured cannot qualify as manufacturers. To allow any such bidder to do so would obviously frustrate the purposes of the Act. As stated in the Decision of the Hearing Examiner "In re Brentwood Radios, Inc.," 12 WH Cases 158, 162 (1954):

> Confident that the Act and Regulations defining a manufacturer contemplate something more than the occasional and isolated performance of such a simple assembly operation on but two Government contract

items of a sundry nature, as disclosed by the record in this case, I have concluded that the corporation cannot justifiedly be regarded as bona fide manufacturer, even of such items, qualified to do business with the Government. Except for the negligible amount of time expended by the two officers of the corporation on such assembly operation over seven years of corporate existence, the corporation has at no time engaged in any other assembly or manufacturing operations for the Government and in no civilian production at all.

(See also "Tyco, Inc. v. Hodgson," 67 CCH Labor Cases ¶ 32,652 (E.D. Va., 1971 (not officially published)); and "In re John F. Noble Company," Decision of the Trial Examiner, PC-184, March 29, 1945.) As the court stated in "George v. Mitchell," 282 F.2d 486, 493 (C.A. D.C., 1960), while Congress in enacting the Walsh-Healey Public Contracts Act "may have been concerned for the small businessman capable of sustaining the administrative burdens of bidding for and processing Government contracts, we do not think it intended to protect producers who could not independently perform those minimal contracting functions."

(d) Packaging by itself does not constitute "assembly." For example, a bidder who proposes to supply bottles of aspirin in units of 100 and whose only operations would be the purchase in bulk of the aspirin and the bottles, the transferring of the aspirin from the bulk container to the bottles, and the labeling, wrapping, and shipping of the bottled aspirin, would not qualify as a manufacturer. Furthermore, a bidder proposing to purchase a hose and a clamp and place the clamp on the hose to make a "hose assembly," and then package and ship the item, is not a manufacturer within the intent of the Act. (See also Decision of the Comptroller General, B-164770, September 3, 1968 (not officially published).)

§ 50-206.53 Regular dealer.

(a) A bidder may qualify as a regular dealer under 41 CFR 50-201.101(b) if it owns, operates, or maintains a store, warehouse, or other establishment in which the commodities or goods of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business. The storage of goods in a public warehouse will not in itself satisfy the place of business requirements of this definition unless there is a continuing right (i.e. bona fide written lease agreement) to a specified, identified amount of space in the warehouse. A bidder who desires to qualify for award as a regular dealer must show to the satisfaction of the contracting agency prior to any award that it is engaged in an established, regular business meeting all the criteria of 41 CFR 50-201.101(a)(2). It is not enough in the case of a regular dealer to show only that arrangements have been made to set up such a business; before an award can be made, it is essential that it shows an already established business regularly dealing in the particular goods or goods of the general character offered to the Government.

(b) A bidder must be able to show before award:

(1) That the bidder has an establishment or leased or assigned space in which it regularly maintains a stock of goods in which it claims to be a dealer; if the space is in a public warehouse, it must be maintained on a continuing, and not on a demand, basis;

(2) That the stock maintained is a true inventory from which sales are made; the requirement is not satisfied by a stock of sample or display goods, or by a stock consisting of surplus goods remaining from prior orders, or by stock unrelated to the supplies which are the subject of the bid, or by a stock maintained primarily for the purpose of token compliance with the Act from which few, if any, sales are made;

(3) That the goods stocked are of the same general character as the goods to be supplied under the contract; to be of the same general character, the items to be supplied must be either identical with those in stock or goods for which dealers in the same line of business would be an obvious source;

(4) That sales are made regularly from stock on a recurring basis; they cannot be only occasional and constitute an exception to the usual operations of the business; the proportion of sales from stock that will satisfy

the requirements will depend upon the character of the business;

(5) That sales are made regularly in the usual course of business to the public, i.e., to purchasers other than Federal, State, or local Government agencies; this requirement is not satisfied if the contractor merely seeks to sell to the public but has not yet made such sales; if Government agencies are the sole purchasers, the bidder will not qualify as a regular dealer; the number and amount of sales which must be made to the public will necessarily vary with the amount of total sales and the nature of the business; and

(6) That the business is an established and going concern; it is not sufficient to show that arrangements have been made to set up such a business.

(c) With regard to the test in paragraphs (b) (5) and (6) of this section, as stated in the Decision of the Administrator, "In re Herbert Co." (9 WH Cases 561, 562 (1950)): "It is plain that the Act and Regulations intended to bar from receipt of Government contracts those persons whose regular method of operation is to secure contracts and thereafter buy elsewhere the goods necessary to fill the contract. While it was not contemplated by the regulations that every Government contract awarded to a dealer be filled from stock on hand, it was the intention to require that Government contracts should be awarded only to those dealers who maintain a stock of goods of the general character required under the Government contract in question, and who, as a regular course of business dealings, make sales from such stocks. It is not sufficient for a dealer to show that some sales are made from stock, or that sales from stock are not unusual in his business; rather he must show that in the usual course of his business a very substantial amount of his sales are made from stocks on hand" (emphasis added).

(d) Coal dealers are exempted from the regular dealer requirements of the Act on certain express terms and conditions which are set forth in 41 CFR 50-201.604(a). The exemption will be applicable only if these conditions are complied with. If they are not, the general definition of regular dealers contained in 41 CFR 50-201.101(a)(2) of the regulations would be applicable.

§ 50-206.54 Regular dealer in particular products.

In addition to the exemptions from the requirements of section 1(a) of the Act which have been granted for certain types of contracts as set forth in 41 CFR 50-201.604, special alternate qualifications have been prescribed for hay, grain, feed, or straw; raw cotton; lumber and timber products; machine tools; green coffee, petroleum; agricultural liming materials; tea; raw or unmanufactured cotton linters; certain uranium products and used automated data processing (ADP) equipment in recognition of existing industrial and commercial practices in those industries. These special qualifications may be found in 41 CFR 50-201.101(a)(2) and 41 CFR 50-201.604. Characteristic of these alternative qualifications is the absence of a requirement that the dealer physically maintain a stock.

§ 50-206.55 Agents.

A "manufacturer" or "regular dealer" within the meaning of the Act and regulations may bid, negotiate, and contract through an authorized agent if the agency is disclosed and the agent bids and contracts in the name of the principal. Brokers from whom foreign-made goods consigned directly to the Government are purchased need not qualify as regular dealers under 41 CFR 50-201.101(a)(2) since the contract itself is not subject to the Act.

§ 50-206.56 Administrative exemptions.

Sections 50-201.101(a)(3)(ii) and 50-201.601 of Regulations 41 CFR Part 50-201, provide for the granting of exceptions and exemptions from the application of section 1(a) of the Act upon request by the head of the contracting agency to the Administrator, Wage and Hour Division. Such request should contain all pertinent information enabling the Administrator to determine if such exemption is necessary to avoid the serious impairment of the conduct of Government business. Any

such request will be published in the FEDERAL REGISTER as a proposal with time for public comment.

PART 50-210—STATEMENTS OF GENERAL POLICY AND INTERPRETATION NOT DIRECTLY RELATED TO REGULATIONS

Sec.

50-210.0 General enforcement policy.
50-210.1 Coverage under the Walsh-Healey Public Contracts Act of truck drivers employed by oil dealers.

§ 50-210.0 General enforcement policy.

(a) In order to clarify at this time the practices and policies which will guide the administration and enforcement of the Fair Labor Standards Act of 1938 (52 Stat 1060, as amended, 29 U.S.C. 201-219), and the Walsh-Healey Public Contracts Act (49 Stat. 2036, as amended; 41 U.S.C. 35-45), as affected by the Portal-to-Portal Act of 1947 (Pub. Law 49, 80th Cong.), the following policy is announced effective June 30, 1947:

(b) The investigation, inspection and enforcement activities of all officers and agencies of the Department of Labor as they relate to the Fair Labor Standards Act (52 Stat. 1060, as amended, 29 U.S.C. 201-219) and the Walsh-Healey Public Contracts Act of June 30, 1936 (49 Stat. 2036, as amended; 41 U.S.C. 35-45), will be carried out on the basis that all employers in all industries whose activities are subject to the provisions of the Fair Labor Standards Act (52 Stat. 1060, as amended; 29 U.S.C. 201-219) or the Walsh-Healey Public Contracts Act (49 Stat. 2036, as amended; 41 U.S.C. 35-45) are responsible for strict compliance with the provisions thereof and the regulations issued pursuant thereto.

(c) Any statements, orders, or instructions inconsistent herewith are rescinded.

(Sec. 4, 49 Stat. 2038; 41 U.S.C. 38)

[12 FR 3916, June 17, 1947. Redesignated at 24 FR 10952, Dec. 30, 1959]

NOTE: The text of § 50-210.0 *General enforcement policy* is identical to that of § 775.0 under 29 CFR Chapter V.

§ 50-210.1 Coverage under the Walsh-Healey Public Contracts Act of truck drivers employed by oil dealers.

(a) The Division of Public Contracts returns to the interpretation contained in Rulings and Interpretations No. 2[1] with respect to coverage under the Walsh-Healey Public Contracts Act of truck drivers employed by oil dealers, by amending section 40(e)(1) of Rulings and Interpretations No. 3[1] to read as follows:

(1) Where the contractor is a dealer, the act applies to employees at the central distributing plant, including warehousemen, compounders, and chemists testing the lot out of which the Government order is filled, the crews engaged in loading the materials in vessels, tank cars or tank wagons for shipment, and truck drivers engaged in the activities described in section 37(m) above.[2] However, the contractor is not required to show that the employees at the bulk stations, including truck drivers, are employed in accordance with the standards of the act. (Bulk stations as the term is used herein are intermediate points of storage between a central distributing plant and service stations.)

(Sec. 4, 49 Stat. 2038; 41 U.S.C. 38)

[12 FR 2477, Apr. 17, 1947. Redesignated at 24 FR 10952, Dec. 30, 1959]

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[1] Not filed with the Office of the Federal Register.

[2] Refers to Rulings and Interpretation No. 3.

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CHAPTER 51—COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED

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PART 51-1—GENERAL

Sec.
51-1.1 Policy.
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51-1.3 Priorities.
51-1.4 Recommendations.

AUTHORITY: Pub. L. 92-28, 85 Stat. 77 (41 U.S.C. 46-48c).

§ 51-1.1 Policy.

(a) The Committee for Purchase from the Blind and Other Severely Handicapped was established by Public Law 92-28, June 23, 1971 (85 Stat. 77, 41 U.S.C. 46-48) (hereinafter the Act) for the purpose of directing the procurement of selected commodities and services by the Federal Government to qualified workshops serving blind and other severely handicapped individuals with the objective of increasing the employment opportunities for these individuals. The Committee is required to establish and publish in the FEDERAL REGISTER a procurement list of:

(1) Commodities produced by any qualified nonprofit agency for the blind or by any qualified nonprofit agency for other severely handicapped, and

(2) The services provided by any such agency which the Committee determines are suitable for procurement by the Government pursuant to the Act.

(b) The Act further provides that any entity of the Government which intends to procure any commodity or service on the procurement list, shall procure such commodity or service, at the price established by the Committee, from a qualified nonprofit agency for the blind or such agency for the other severely handicapped if the commodity or service is available within the normal period required by that Government entity. However, this requirement shall not apply to the procurement of any commodity which is available from Federal Prison Industries, Inc.

[38 FR 16316, June 21, 1973, as amended at 39 FR 35365, Oct. 1, 1974]

§ 51-1.2 Definitions.

As used in this chapter:

(a) "Committee" means the Committee for Purchase from the Blind and Other Severely Handicapped.

(b) "Direct labor" means all work required for preparation, processing, and packing of a commodity or work directly related to the performance of a service but not supervision, administration, inspection or shipping.

(c) "Fiscal year" means the 12-month period beginning on October 1 of each year.

(d) "Government" and "entity of the Government" means any entity of the legislative branch or the judicial branch, any executive agency or military department, the U.S. Postal Service, and any nonappropriated fund instrumentality under the jurisdiction of the Armed Forces.

(e) "State" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(f) "Blind" means an individual or class of individuals whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity, if better than 20/200 is accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle no greater than 20°.

(g) "Other severely handicapped" means a person, other than a blind person, who has a severe physical or mental impairment (a residual, limiting condition resulting from an injury, disease, or congenital defect) which so limits the person's functional capabilities (mobility, communication, self-care, self-direction, work tolerance or work skills) that the individual is unable to engage in normal competitive employment over an extended period of time.

(1) Capability for normal competitive employment shall be determined from information developed by an ongoing evaluation program conducted by or for the workshop and shall include, as a minimum, a preadmission evaluation and a reevaluation at least annually of each individual's capability for normal competitive employment.

(2) A person with a severe physical or mental impairment who is able to engage in normal competitive employment because the impairment has been overcome or the condition has been substantially corrected is not "other severely handicapped" within the meaning of this definition.

(h) "Qualified nonprofit agency for the blind" (hereinafter workshop for the blind) means an agency organized under the laws of the United States or of any State, operated in the interest of blind individuals, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual; which complies with applicable occupational health and safety standards prescribed by the Secretary of Labor; and which in the production of commodities and the provision of services (whether or not the commodities or services are procured under these regulations) during the fiscal year employs blind individuals for not less than 75 percent of the man-hours of direct labor required for the production or provision of the commodities or services.

(i) "Qualified nonprofit agency for other severely handicapped" (hereinafter workshop for other severely handicapped) means an agency organized under the laws of the United States or of any State, operated in the interests of severely handicapped individuals who are not blind, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual; which complies with applicable occupational health and safety standards prescribed by the Secretary of Labor; and which in the production of commodities and the provision of services (whether or not the commodities or services are procured under these regulations) during the fiscal year employs severely handicapped individuals (including blind) for not less than 75 percent of the man-hours of direct labor required for the production or provision of commodities or services.

(j) "Procurement list" means a list of (1) the commodities, including military resale commodities, produced by any workshop for the blind or by any workshop for other severely handicapped, and (2) the services, provided by any such workshop, which the Committee determines are suitable for procurement by the Government pursuant to these regulations.

(k) "Military resale commodities" means commodities on the procurement list sold for the private, individual use of authorized patrons of Armed Forces commissaries and exchanges, or like activities of other Government departments and agencies.

(l) "Central nonprofit agency" means an agency organized under the laws of the United States or of any State, operated in the interest of the blind or other severely handicapped, the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual, and designated by the Committee to facilitate the distribution (by direct allocation, subcontract, or any other means) of orders of the Government for commodities and services on the procurement list among workshops for the blind or workshops for other severely handicapped, and to assist the Committee in administering these regulations.

(m) "Ordering office" means any activity in an entity of the Government that places orders for the procurement of any commodity or service on the procurement list.

(n) "Workshop" means a workshop for the blind or a workshop for other severely handicapped, as appropriate.

(o) "Participating workshop" means any workshop which has been authorized by the Committee to produce a commodity or provide a service to the Government under the Act.

[38 FR 16316, June 21, 1973, as amended at 39 FR 35365, Oct. 1, 1974; 41 FR 45565, Oct. 15, 1976; 44 FR 5433, Jan. 26, 1979]

§ 51-1.3 Priorities.

(a) The Federal Prison Industries, Inc. has priority, under the provisions of section 4124 of title 18, United States Code, over workshops for the blind and other severely handicapped in the production of commodities for sale to the Government. All or a portion of the Government's requirement for a commodity for which Federal Prison Industries, Inc. has exercised its priority may be added to the Pro-

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curement List. However, such addition is made with the understanding that procurement under the Act shall be limited to that portion of the Government's requirement for the commodity which is not available from the Federal Prison Industries, Inc.

(b) The Committee, in the assignment of commodities for procurement under the Act, shall accord priority to commodities, including military resale commodities, produced and offered for sale by workshops for the blind.

[42 FR 13552, Mar. 11, 1977]

§ 51-1.4 Recommendations.

All individuals, particularly those concerned with procurement, are encouraged to recommend to the Committee any commodities and services which appear to be suitable for procurement by the Government from blind or other severely handicapped workshops.

[38 FR 16316, June 21, 1973]

PART 51-2—COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED

Sec.
51-2.1 Membership.
51-2.2 Responsibility.
51-2.3 Duties and powers.
51-2.4 Procurement list.
51-2.5 Fair market price.
51-2.6 Suitability.
51-2.7 Reconsideration of Committee decision.

AUTHORITY: Pub. L. 92-28, 85 Stat. 77 (41 U.S.C. 46-48c).

§ 51-2.1 Membership.

Under the Act the Committee is composed of 15 members appointed by the President. There is one representative from each of the following departments or agencies of the Government: The Department of Agriculture, the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the Department of Health, Education and Welfare, the Department of Commerce, the Department of Justice, the Department of Labor, the Veterans Administration, and the General Services Administration. Four members are private citizens: One who is conversant with the problems incident to the employment of blind individuals; one who is conversant with the problems incident to the employment of other severely handicapped individuals; one who represents blind individuals employed in qualified nonprofit agencies for the blind; and one who represents severely handicapped individuals (other than blind) employed in qualified nonprofit agencies for the other severely handicapped.

[39 FR 35365, Oct. 1, 1974]

§ 51-2.2 Responsibility.

It is the Committee's responsibility to administer the Act, the purpose of which is to direct the procurement of selected products and services by the Federal Government to qualified workshops for the blind and other severely handicapped. The objective is to increase the opportunities for the employment of blind and other severely handicapped individuals and, whenever possible, to prepare these individuals to engage in normal competitive employment.

[38 FR 16317, June 21, 1973]

§ 51-2.3 Duties and powers.

The duties and powers of the Committee are:

(a) To establish and publish in the FEDERAL REGISTER a procurement list of those commodities and services which it determines are suitable for workshops for the blind or other severely handicapped to supply to the Government.

(b) To determine the fair market price of the commodities or services on the procurement list and to revise its price determinations in accordance with changing market conditions.

(c) To designate a central nonprofit agency or agencies to facilitate the distribution, among the workshops for the blind and other severely handicapped, of orders of the Government for commodities or services appearing on the procurement list (by direct allocation, subcontract, or any other means).

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(d) To establish rules and regulations regarding the effective implementation of the Act.

(e) To assure that workshops for the blind will have priority over workshops for other severely handicapped in the production of commodities.

(f) To conduct a continuing study and evaluation of its activities under the Act for the purpose of assuring effective and efficient administration of the Act. On its own, or in cooperation with other public or nonprofit private agencies, the Committee may study problems relating to the employment of the blind and other severely handicapped individuals, and to the development and adaptation of production methods which would enable a greater utilization of these individuals.

[38 FR 16317, June 21, 1973, as amended at 42 FR 13552, Mar. 11, 1977]

§ 51-2.4 Procurement list.

The Committee shall issue to each ordering office a procurement list which will include commodities and services which shall be procured from the indicated central nonprofit agency or its workshops.

(a) For commodities (except military resale commodities), the procurement list includes the item description, specification identification, and other pertinent information.

(b) For services, the procurement list identifies the type of service to be provided, the area(s) and/or agency(s) to be serviced and includes information on prices.

(c) For military resale commodities, the procurement list includes name of commodity and identification number.

[38 FR 16317, June 21, 1973, as amended at 41 FR 45565, Oct. 15, 1976]

§ 51-2.5 Fair market price.

The Committee is responsible for determining the fair market prices including changes thereto, for commodities or services on the procurement list and shall consider recommendations from the procuring agencies and the central nonprofit agency concerned. Recommendations for fair market prices or changes thereto shall be submitted by the workshops to the central nonprofit agency representing the workshop. The central nonprofit agency shall analyze the data and submit a recommended fair market price to the Committee along with the detailed justification necessary to support the recommended price.

[38 FR 16317, June 21, 1973]

§ 51-2.6 Suitability.

(a) The Committee has eatablished the following criteria for determining if a commodity or service to suitable for addition to the Procurement List:

(1) A qualified workshop must be capable of producing the commodity or providing the service at a fair market price.

(2) The addition of the community or service to the Procurement List would not have a serious adverse impact on the current or most recent contractor for the commodity or service.

(b) To qualify to participate under the Act, a workshop must meet the requirements as a nonprofit agency serving the blind or other severely handicapped set forth in Part 51-4 of this chapter. A workshop desiring to produce a commodity or provide a service under the Act must satisfy the Committee that it will have the capability to meet the Government's quality standards and delivery schedules by the time it assumes responsibility for supplying the Government under the Act and that it can supply he commodity or service at a fair market price.

(c) At least 30 days prior the Committee's consideration of the addition of a commodity or serive to the Procurement List, the Committee publishes a notice in the FEDEAL REGISTER announcing the proposed addition and providing interested persons an opportunity to submit written data, views, or arguments on the proposed addition.

(d) In deciding whether or not a proposed addition to the Procurement List would have a serious adverse impact on the current or most recent contractor for the particular commodity or service, the Committee gives particular attention to:

(1) The possible impact on that contractor's sales, including any cumula-

tive impact as the result of other recent Committee actions.

(2) Whether or not that contractor has been a continuous supplier to the Government of the specific commodity or serive proposed for addition and is, therefore, more dependent on the income from such sales to the Government, and

(3) Any substantive comments received as the result of the notice in the FEDERAL REGISTER.

(e) The Committee considers the particular facts and circumstances in each cases in determinin if a commodity or service is suitable for addition to the Procurement List. When the Committee determines that a proposed addition to the Procurement List would have a serious adverse impact on a particular company, it takes this fact into consideration in deciding whether or not the Government's procurement of the commodity or service in question, or a portion thereof, should be added to the Procurement List.

[42 FR 36457, July 15, 1977]

§ 51-2.7 Reconsideration of Committee decision.

An interested person may request reconsideration of a Committee decision by submitting a request to the Committee in writing setting forth the facts which he or she considers would justify the Committee's modifying or reversing its decision.

[42 FR 36458, July 15, 1977]

PART 51-3—CENTRAL NONPROFIT AGENCIES

Sec.

51-3.1 General.
51-3.2 Responsibilities.
51-3.3 Assignment of commodity or service.
51-3.4 Distribution of orders.
51-3.5 Fees.
51-3.6 Reports to central nonprofit agencies.

AUTHORITY: Pub. L. 92-28, 85 Stat. 77 (41 U.S.C. 46-48c).

§ 51-3.1 General.

Under the provisions of section 2(c) of the Act, the following are designated central nonprofit agencies:

(a) To represent the workshops for the blind: National Industries for the Blind.

(b) To represent the workshops for other severely handicapped: National Industries for the Severely Handicapped, Inc.

[41 FR 26906, June 30, 1976]

§ 51-3.2 Responsibilities.

Each central nonprofit agency for its participating workshops shall:

(a) Represent them in dealing with the Committee under the Act.

(b) Evaluate the qualifications and capabilities of its workshops and provide the Committee with pertinent data concerning its workshops, their status as qualified nonprofit agencies, their manufacturing or service capabilities, and other information required by the Committee.

(c) Recommend to the Committee, with appropriate justification including recommended prices, suitable commodities or services for procurement from its workshops.

(d) Distribute within the policy guidelines of the Committee (by direct allocation, subcontract, or any other means) orders from Government activities among its workshops.

(e) Maintain the necessary records and data on its workshops to enable it to allocate orders equitably.

(f) Supervise its workshops to insure contract compliance in the production of a commodity or performance of a service.

(g) As market conditions change, recommend price changes with appropriate justification for assigned commodities or services on the procurement list.

(h) Monitor and inspect the activities of its workshops to insure compliance with the Act and appropriate regulations.

(i) When authorized by the Committee, enter into contracts with the Federal procuring activities for the furnishing of commodities or services provided by its workshops.

(j) At the time the central nonprofit agency recommends to the Committee the addition of a commodity or service to the Procurementa List, it shall submit a completed, original copy of

the appropriate Initial Certification (Committee Form 401 or 402) for the workshop concerned. This requirement does not apply to a workship that is already authorized to produce a commodity or provide a service under the Act.

(k) Review and forward to the Committee by December 15 of each year a completed, original copy of the appropriate Annual Certification (Committee Form 403 or 404) for each of its participating workshops covering the fiscal year ending the preceding September 30.

[38 FR 16318, June 21, 1973, as amended at 41 FR 45565, Oct. 15, 1976; 42 FR 13552, Mar. 11, 1977; 45 FR 10345, Feb. 15, 1980]

§ 51-3.3 Assignment of commodity or service.

(a) The central nonprofit agency first proposing a service for possible addition to the Procurement List shall be assigned the service.

(b) Within 60 days after notification by the Committee that a commodity has been proposed for possible addition to the Procurement List, the Federal Prison Industries, Inc., and the National Industries for the Blind (for commodities proposed by the National Industries for the Severely Handicapped) shall notify the Committee of their decisions regarding the exercise or waiver of priority on the proposed commodity.

(c) When the Federal Prison Industries, Inc. exercises its priority for a commodity proposed by the National Industries for the Blind or the National Industries for the Severely Handicapped for possible addition to the Procurement List, the commodity may be assigned to the National Industries for the Blind or the National Industries for the Severely Handicapped in accordance with paragraph (d) or (e) of this section.

(d) When the National Industries for the Blind proposes a commodity for possible addition to the Procurement List, it shall be assigned to the National Industries for the Blind.

(e) When the National Industries for the Severely Handicapped proposes a commodity for possible addition to the Procurement List, it shall be assigned to the National Industries for the Severely Handicapped, unless the National Industries for the Blind exercises the priority accorded to the workshops for the blind, in which case the commodity shall be assigned to the National Industries for the Blind.

(f) When the National Industries for the Blind exercises the priority of the workshops for the blind for a commodity which was initially proposed by the National Industries for the Severely Handicapped, the National Industries for the Blind shall complete the essential steps to place the commodity on the Procurement List within nine months after assignment. If the National Industries for the Blind has not completed these steps within that time period, the Committee shall reassign the commodity to the National Industries for the Severely Handicapped. However, the nine-month period may be extended for a reasonable period of time when the National Industries for the Blind has been delayed by conditions beyond its control.

[42 FR 13552, Mar. 11, 1977]

§ 51-3.4 Distribution of orders.

Central nonprofit agencies shall distribute orders from the Government only to workshops which the Committee has approved to produce the specific commodity or to perform the particular service. When the Committee has approved two or more workshops to produce a specific commodity or perform a particular service, the central nonprofit agency shall distribute orders among those workshops in a fair and equitable manner.

[38 FR 16318, June 21, 1973]

§ 51-3.5 Fees.

The fees the central nonprofit agency shall charge workshops for facilitating participation by their workshops under the Act shall not exceed the rates approved by the Committee.

[38 FR 16318, June 21, 1973]

§ 51-3.6 Reports to central nonprofit agencies.

Any information, other than that contained in the Annual Certification required by § 51-4.3(a)(4), which a central nonprofit agency requires its

workshops to submit on an annual basis shall be requested separately from the Annual Certification. Any such request shall not indicate that the information is requested by the Committee. The central nonprofit agency shall, prior to distribution, provide to the Committee a copy of each form which it plans to use to obtain such information from its workshops and, when requested, shall make available to the Committee the results of the information so obtained.

[45 FR 10345, Feb. 15, 1980]

PART 51-4—WORKSHOPS

Sec.
51-4.1 General.
51-4.2 Procedures for qualification.
51-4.3 Responsibilities.
51-4.4 Subcontracting.
51-4.5 Production.
51-4.6 Violations.

AUTHORITY: Pub. L. 92-28, 85 Stat. 77 (41 U.S.C. 46-48c).

SOURCE: 38 FR 16318, June 21, 1973, unless otherwise noted.

§ 51-4.1 General.

To participate under the Act, a workshop shall be represented by the appropriate central nonprofit agency. The designation of the central nonprofit agency shall not be changed without prior written approval of the Committee.

[41 FR 26906, June 30, 1976]

§ 51-4.2 Procedures for qualification.

(a) To qualify for participation under the Act,

(1) A workshop, other than a State-owned or State-operated workshop, shall submit to the Committee through its central nonprofit agency the following documents, transmitted by a letter signed by an officer of the corporation or chief executive:

(i) A legible copy (preferably a photocopy) of the articles of incorporation showing the date of filing and the signature of an appropriate State official.

(ii) A copy of the bylaws certified by an officer of the corporation.

(iii) If the articles of incorporation or bylaws do not include a statement to the effect that no part of the net income of the workshop may inure to the benefit of any shareholder or other individual, one of the following:

(*a*) A certified true copy of the State statute under which the workshop was incorporated which includes wording to the effect that no part of the net income of the workshop may inure to the benefit of any shareholder or other individual.

(*b*) A copy of a resolution approved by the governing body of the corporation, certified by an officer of the corporation to the effect that no part of the net income of the workshop may inure to the benefit of any shareholder or other individual.

(*c*) A copy of the Internal Revenue Service certificate, duly executed during the prior twelve months, indicating that the corporation has been accepted as a non-profit agency for taxation purposes.

(2) A State-owned or State-operated workshop for the blind or other severely handicapped shall submit to the Committee through its central nonprofit agency the following documents, transmitted by a letter signed by an officer of the wholly-owned State corporation or an official of the agency that directs the operations of the workshop, as applicable:

(i) A certified true copy of the State statute establishing or authorizing the establishment of workshop(s) for the blind or other severely handicapped.

(ii) In the case of a wholly-owned State corporation, a certified true copy of the corporation bylaws; and, in the case of a State agency, a certified true copy of implementing regulations, operating procedures, notice of establishment of the workshop, or other similar documents.

(b) The Committee shall review the documents submitted and, if they are acceptable notify the workshop by letter, with a copy to its central nonprofit agency, that the Committee has verified its nonprofit status under the Act.

(c) A workshop shall submit two completed copies of the appropriate Initial Certification (Committee Form 401 or 402) to its central nonprofit agency, when the addition of a commodity or service is recommended to the Committee for provision by the

workshop. This requirement does not apply if a workshop is already authorized to produce a commodity or provide a service under the Act.

(d) To maintain its qualification under the Act, each workshop authorized to produce a commodity or provide a service under the Act must continue to meet the requirements for a "workshop for the blind" or "workshop for the other severely handicapped" as defined in § 51-1.2 (h) or (i), respectively. Additionally, each such workshop shall complete and submit the appropriate Annual Certification (Committee Form 403 or 404) as required by paragraph 51-4.3(a)(4).

(e) The information collection requirements of this section have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and have been assigned the following OMB control numbers:

Committee form	OMB control No.
Committee Form 401	3037-0004
Committee Form 402	3037-0003
Committee Form 403	3037-0001
Committee Form 404	3037-0002

[38 FR 16318, June 21, 1973, as amended at 41 FR 11515, Mar. 19, 1976; 45 FR 10345, Feb. 15, 1980; 45 FR 16488, Mar. 14, 1980; 46 FR 63047, Dec. 30, 1981]

§ 51-4.3 Responsibilities.

(a) Each workshop participating under the Act shall:

(1) Furnish commodities or services in strict accordance with the allocation and Government orders.

(2) Make its records available for inspection at any reasonable time to representatives of the Committee or the central nonprofit agency representing the workshop.

(3) Maintain records of direct labor hours performed in the workshop by each worker.

(4) Submit to its central nonprofit agency by November 15, two completed copies of the appropriate Annual Certification covering the fiscal year ending the preceding September 30.

(5) Comply with applicable occupational health and safety standards prescribed by the Secretary of Labor.

(6) Maintain a file on each blind individual which includes a written report reflecting visual acuity and field of vision of each eye, with and without glasses, signed by a person licensed to make such an evaluation.

(7) Maintain an ongoing placement program operated by or for the workshop to include liaison with appropriate community services such as the State employment service, employer groups and others; and list with one or more of these services those individuals capable of normal competitive employment.

(b) Each workshop for other severely handicapped participating under the Act shall, in addition to the requirements of paragraph (a) of this section, maintain a file for each other severely handicapped individual which includes:

(1) A written report signed by a licensed physician, psychiatrist, or qualified psychologist reflecting the nature and extent of the disability or disabilities that cause such person to qualify as other severely handicapped.

(2) Reports which state that the individual is not capable of engaging in normal competitive employment. These reports shall be signed by a person or persons qualified by training and experience to evaluate the work potential, interests, aptitudes, and abilities of handicapped persons and shall normally consist of preadmission evaluations and reevaluations prepared at least annually. The file on individuals who have been in the workshop for less than two years shall contain the preadmission report and, where appropriate, the next annual reevaluation. The file on individuals who have been in the workshop for two or more years shall contain, as a minimum, the reports of the two most recent annual reevaluations.

(c) The recordkeeping requirements of this section have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and have been assigned OMB control number 3037-0005.

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[38 FR 16318, June 21, 1973, as amended at 45 FR 10345, Feb. 15, 1980; 46 FR 30085, June 5, 1981; 46 FR 63047, Dec. 30, 1981]

§ 51-4.4 Subcontracting.

(a) Workshops shall seek broad competition in the purchase of raw materials and components used in the commodities and services provided the Government under the Act. Workshops shall inform the Committee before entering into multiyear contracts for raw materials or components used in the commodities and services provided the Government under the Act.

(b) Each workshop shall accomplish the maximum amount of subcontracting to small business concerns that the workshop finds to be consistent with efficient performance in producing commodities or providing services under the Act.

§ 51-4.5 Production.

In the production of commodities under the Act, a workshop shall make an appreciable contribution to the reforming of raw materials or the assembly of components or a combination thereof.

§ 51-4.6 Violations.

Any alleged violations of these regulations by a workshop shall be investigated by the appropriate central nonprofit agency which shall notify the workshop concerned and afford it an opportunity to submit a statement of facts and evidence. The central nonprofit agency shall report its findings to the Committee, together with its recommendations, including a recommendation regarding whether allocations to workshops concerned should be suspended for a period of time. In reviewing the case, the Committee may request the submission of additional evidence or may hold a hearing on the matter. Pending a decision by the Committee, the central nonprofit agency concerned may be directed by the Committee to temporarily suspend allocations to the workshop.

PART 51-5—PROCUREMENT REQUIREMENTS AND PROCEDURES

Sec.

51-5.1-1 General.
51-5.1-2 Allocations and orders.
51-5.2 Purchase exceptions.
51-5.3 Prices.
51-5.4 Shipping and packing.
51-5.5 Payments.
51-5.6 Military resale commodities.
51-5.7 Adjustment and cancellation of orders.
51-5.8 Correspondence and inquiries.
51-5.9 Quality of merchandise.
51-5.10 Quality complaints.
51-5.11 Specification changes.

AUTHORITY: Pub. L. 92-28, 85 Stat. 77 (41 U.S.C. 46-48c).

SOURCE: 38 FR 16319, June 21, 1973, unless otherwise noted.

§ 51-5.1-1 General.

(a) Ordering offices shall obtain commodities and services on the procurement list from the central nonprofit agency shown thereon or its designated workshop(s), except for commodities identified on the procurement list as available through Defense Supply Agency (DSA) or from General Services Administration (GSA) supply distribution facilities.

(b) When a commodity is identified on the Procurement List as being available through DSA or from GSA supply distribution facilities, it shall be obtained in accordance with the requisitioning procedures of the supplying agency. If the supplying agency cannot supply such a commodity, it shall inform the ordering office that the commodity must be procured in accordance with the provisions of this part.

(c) DSA supply centers and GSA supply distribution facilities shall also obtain commodities on the procurement list from the central nonprofit agency shown thereon or its designated workshop(s).

(d) Procedures for obtaining military resale commodities are contained in section 51-5.6.

[38 FR 16319, June 21, 1973, as amended at 42 FR 13553, Mar. 11, 1977]

§ 51-5.1-2 Allocations and orders.

(a) Allocation is the action to be taken by a central nonprofit agency to designate the workshop(s) that will produce definite quantities of commodities or perform specific services upon receipt of an order from the ordering office.

(b) Letter requests for allocation shall be submitted to the appropriate central nonprofit agency listed below:

Agency	Agency Symbol
National Industries for the Blind, 3530 Moncure Avenue, Falls Church, Virginia 22041	IB
National Industries for the Severely Handicapped, 4350 East-West Highway, Suite 1120, Washington, D.C. 20014	SH

(c) Central nonprofit agencies may authorize the ordering office to transmit orders for specified commodities or services directly to the workshop(s) concerned without requesting an allocation for each order. In these cases the central nonprofit agency shall specify the normal leadtime required for orders transmitted directly to the workshop(s). This method shall be used whenever possible since it eliminates double handling and decreases the time required for processing orders.

(d) Requests for allocations shall contain for:

(1) Commodities. Name, stock number, latest specification, quantity, unit price, and place and time of delivery.

(2) Services. Type and location of service required, latest specification, work to be performed, estimated volume, and time for completion.

(e) Ordering offices shall request allocations in sufficient time for the central nonprofit agency to reply, for the order(s) to be placed, and for the workshops to produce the commodity or provide the service (see paragraph (k) of this section).

(f) When a commodity on the procurement list also appears on the schedule of products, Federal Prison Industries, Inc. (FPI), the ordering office shall obtain clearance from FPI prior to requesting an allocation or placing an order directly to the workshop(s).

(g) The central nonprofit agency shall make allocations to the appropriate workshop(s) upon receipt of a request from the ordering office and instruct the ordering office to forward the order to the central nonprofit agency or direct to the workshop(s).

(h) Central nonprofit agencies shall reply promptly to requests for allocations. When a request for allocation provides a delivery schedule which cannot be met, the central nonprofit agency shall request a revision, which the ordering office should grant, if feasible, or the central nonprofit agency shall issue a purchase exception authorizing procurement from commercial sources as provided in § 51-5.2.

(i) Allocations are not an obligation to supply any commodity or service, nor an obligation for the ordering office to issue an order, nor are workshops authorized to commence production until receipt of an order.

(j) Upon receipt of an allocation, the ordering office shall promptly submit an order to the appropriate central nonprofit agency or designated workshop(s). Where this cannot be done promptly, the ordering office shall so advise the central nonprofit agency and the workshop(s) immediately.

(k) An order for commodities or services shall provide leadtime sufficient for purchase of materials, production or preparation, and delivery or completion.

(l) The central nonprofit agency shall keep the ordering office informed of any changes in leadtime experienced by its workshop(s) in order to keep to a minimum requests for extensions once an order is placed by the ordering office. Where, due to unusual conditions, an order does not provide sufficient leadtime, the central nonprofit agency or workshop, depending on which received the order, may request an extension of delivery or completion date which should be granted, if feasible. If extension of delivery or completion date is not feasible, the ordering office shall (i) notify the central nonprofit agency and workshop(s) as appropriate, and (ii) request the central nonprofit agency to reallocate or to issue a purchase exception

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authorizing procurement from commercial sources as provided in § 51-5.2.

(m) The ordering office shall provide to the central nonprofit agency concerned a copy of all orders to workshops.

[38 FR 16319, June 21, 1973, as amended at 39 FR 35365, Oct. 1, 1974; 41 FR 26906, June 30, 1976; 46 FR 30085, June 5, 1981]

§ 51-5.2 Purchase exceptions.

(a) A central nonprofit agency shall grant a purchase exception for an ordering office to procure from commercial sources commodities or services on the procurement list when both of the following conditions are met:

(1) The central nonprofit agency cannot furnish a commodity or service within the period specified, and

(2) The commodity or service is available from commercial sources in the quantities and at an earlier time than it is available from the workshop(s).

(b) The central nonprofit agency may grant a purchase exception when the quantity involved is not sufficient for economical production or provision by the workshop(s).

(c) When the conditions in paragraphs (a) and (b) of this section are met, the central nonprofit agency shall provide a purchase exception promptly and shall specify the quantities and delivery period covered by the exception. The central nonprofit agency shall inform the Committee prior to issuing a purchase exception to procure a commodity or service from commercial sources when the value of the procurement is $2,500 or more.

(d) When a purchase exception is granted for procurement from commercial sources under paragraph (a) of this section:

(1) Purchase action shall be taken within 15 days following the date of the purchase exception or as may be extended by the central nonprofit agency with the concurrence of the Committee.

(2) A copy of the solicitation shall be provided to the appropriate central nonprofit agency at the time it is issued.

(e) The Committee shall grant a purchase exception when it deems such action is appropriate.

[38 FR 16319, June 21, 1973, as amended at 42 FR 13553, Mar. 11, 1977]

§ 51-5.3 Prices.

(a) The prices included in the procurement list are fair market prices established by the Committee.

(b) Prices for commodities, except for military resale commodities, are for delivery aboard the vehicle of the initial carrier at point of production (f.o.b. shipping point), and include packaging, packing, and marking as shown on the procurement list.

(c) Price changes for commodities and services shall usually apply to orders received by the workshop on or after the effective date of the change. In special cases, after considering the views of the ordering office, the Committee may make price changes applicable to orders received by the workshop prior to the effective date of the change.

(d) Some prices are different for eastern and western areas of the United States. The western area includes the States of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, and Washington. Western-area prices are applicable to items manufactured by workshops located in these States.

(e) If an ordering office desires packing, packaging, or marking of products other than the standard pack or as provided in the procurement list, the difference in cost thereof, if any, shall be added to the purchase price.

[38 FR 16319, June 21, 1973, as amended at 44 FR 30340, May 25, 1979]

§ 51-5.4 Shipping and packing.

(a) For commodities, except for military resale commodities, delivery is accomplished when a shipment is placed aboard the vehicle of the initial carrier. Time of delivery is the date shipment is released to and accepted by the initial carrier. Method of transportation to destination shall normally be by Government bills of lading. However, for small shipments, the ordering office may designate another method of transportation on its order. When

shipments are under Government bills of lading, the bills of lading may accompany orders or be otherwise furnished, but they shall be supplied promptly. Failure by an ordering office to furnish bills of lading promptly, or to designate a method of transportation, may result in an excusable cause for delay in delivery. When the workshop pays for transportation to destination, these costs shall be included as a separate item on the workshop's invoice and the workshop shall be reimbursed by the ordering office for these costs.

(b) Standard pack information is stated in item descriptions. In ascending order, standard pack is given in multiples of the unit of issue contained within the inner wrap(s) and the outer shipping container pack.

(c) Shipping weights, where available, are included in the procurement list. The weight indicated applies to the last quantity shown in the information on standard pack.

[38 FR 16319, June 21, 1973, as amended at 41 FR 11516, Mar. 19, 1976]

§ 51-5.5 Payments.

Payments for products or services of the blind or other severely handicapped shall normally be made within 20 days, but in no event later than 30 days, after shipment or receipt of a correct invoice or voucher.

§ 51-5.6 Military resale commodities.

(a) Purchase procedures for ordering military resale commodities are contained in instructions issued by the designated central nonprofit agency and are available upon request from that agency. Military commissary stores, Armed Forces exchanges and like activities of other Government departments and agencies (authorized resale outlets) shall request the central nonprofit agency to designate the workshop to which orders shall be forwarded.

(b) Authorized resale outlets shall stock military resale commodities in as broad a range as is practicable. Authorized resale outlets may stock items procured from commercial sources which are comparable to a military resale commodity, provided the military resale commodity is also stocked, except that in military commissary stores military resale commodities in the 900-series normally shall be stocked exlusively. The stocking of commerical items in military commissary stores which are comparable to 900-series military resale commodities shall be restricted to those individual items, on a store-by-store basis, for which there is significant customer demand.

(c) Each military department shall, after consultation with the Committee:

(1) Establish mandatory lists of military resale commodities to be stocked in commissary stores.

(2) Require the stocking in commissary stores of military resale commodities in both the 500- and 900-series in as broad a range as is practicable.

(3) Issue guidance to commissary store personnel to take those actions required to achieve the maximum sales potential of military resale commodities.

(4) Establish policies and procedures which reserve at a level not lower than its military commissary service headquarters the authority to grant exceptions to the exclusive stocking of 900-series military resale commodities.

(d) Each military department shall provide the Committee a copy of each directive which relates to the stocking of military resale commodities in commissary stores, including exceptions authorizing the stocking of commercial items in competition with 900-series military resale commodities.

(e) The prices of military resale commodities includes delivery to destination or, in the case of destinations overseas (including Alaska and Hawaii), to designated depots at ports of embarkation.

[43 FR 28496, June 30, 1978]

§ 51-5.7 Adjustment and cancellation of orders.

When the central nonprofit agency or a workshop fails to comply with the terms of a Government order, the ordering office shall make every effort to negotiate an adjustment before taking action to cancel the order. When a Government order is canceled for failure to comply with its terms,

the central nonprofit agency shall be notified, and, if practicable, requested to reallocate the order. The central nonprofit agency shall notify the Committee of any cancellation of an order and the reasons therefor.

§ 51-5.8 Correspondence and inquiries.

Routine correspondence or inquiries concerning deliveries of commodities being shipped from or performance of service by blind and other severely handicapped workshops shall be with the workshop involved. Major problems shall be referred to the appropriate central nonprofit agency. In those instances where the problem cannot be resolved by the central nonprofit agency and the procuring activity involved, the procuring activity or central nonprofit agency shall notify the Committee of the problem so that action can be taken by the Committee to resolve it.

[38 FR 16319, June 21, 1973, as amended at 42 FR 13553, Mar. 11, 1977]

§ 51-5.9 Quality of merchandise.

(a) Commodities furnished under Government specification by blind or other severely handicapped workshops shall be manufactured in strict compliance with such specifications. Where no specifications exist, commodities produced shall be of the highest quality and equal to similar items available on the commercial market. Commodities shall be inspected utilizing nationally recognized test methods and procedures for sampling and inspection.

(b) Services provided by blind or other severely handicapped workshops shall be performed in accordance with Government specifications and standards. Where no Government specification or standard exists, the services shall be performed in accordance with good commercial practices.

§ 51-5.10 Quality complaints.

(a) When the quality of a commodity received is not considered satisfactory by the using activity, the activity shall take the following actions as appropriate:

(1) For commodities received from DSA supply centers or GSA supply distribution facilities, notify the supplying agency in accordance with that agency's procedures.

(2) For commodities received from blind or other severely handicapped workshops, address complaints to the workshop involved with a copy to the central nonprofit agency with which it is affiliated.

(b) When the quality of a service is not considered satisfactory by the using activity, the activity shall address complaints to the workshop involved with a copy to the central nonprofit agency with which it is affiliated.

(c) In those instances where quality problems cannot be resolved by the workshop and the using activity, the Committee and the central nonprofit agency shall be advised.

§ 51-5.11 Specification changes and similar actions.

(a) Specifications or other descriptions for commodities on the procurement list may undergo a series of changes to keep current with industry changes and agency needs. Since it is not feasible to show the latest revision current on the publication date, only the basic specification or description is referenced in the procurement list. Procurement agencies shall notify the workshop and the central nonprofit agency concerned of the latest applicable specification or description.

(b) When a Government department or agency is changing the specification or description of a commodity on the Procurement List, including a change that involves the assignment of a new national stock number or item designation, the office assigned responsibility for the action shall obtain the comments of the Committee and the central nonprofit agency concerned on the proposed change and shall notify the workshop and the central nonprofit agency concerned at least 90 days prior to placing an order for a commodity covered by the new specification or description.

(c) Similarly for services, the procuring activity shall notify the workshop and central nonprofit agency concerned at least 90 days prior to the date that any changes in the scope of

work or other conditions will be required.

(d) When, in order to meet its emergency needs, a procuring activity is unable to give the 90-day notification required in paragraphs (b) and (c) above, the procuring activity shall, at the time it places the order or change notice, inform the workshop and the central nonprofit agency in writing of the reasons it cannot meet the 90-day notification requirement.

[46 FR 30085, June 5, 1981]

§ 51-5.12 Replacement commodities.

When a commodity on the Procurement List is replaced by another commodity which has not been previously procured, and a qualified workshop can produce the replacement commodity in accordance with the Government's quality standards and delivery schedules and at a fair market price, the replacement commodity is automatically on the Procurement List and shall be procured from the workshop designated by the Committee. The commodity being replaced shall continue to be included on the Procurement List until there is no longer a requirement for that commodity.

[46 FR 30086, June 5, 1981]

PART 51-6—PREPARATION OF ENVIRONMENTAL STATEMENTS

Sec.

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AUTHORITY: Pub. L. 91-190, January 1, 1970. (42 U.S.C. 4332(2)(C)).

SOURCE: 40 FR 2980, Jan. 17, 1975, unless otherwise noted.

§ 51-6.1 Purpose and authority.

(a) *Authority.* The following procedures are established, after consultation with the Council on Environmental Quality, in accordance with the requirements of section 102(2)(C) of the National Environmental Policy Act of 1969, Public Law 91-190 (42 U.S.C. 4332(2)(C)), hereinafter referred to as NEPA; section 2 of Executive Order 11514 (42 U.S.C. 4321 Note); and 1500.3 of the Guidelines for Preparation of Environmental Impact Statements promulgated by the Council on Environmental Quality, 40 CFR Part 1500 (38 FR 20550), hereby incorporated by reference and hereafter referred to as the CEQ Guidelines.

(b) *Scope.* These procedures apply to the recognition of the need for environmental impact statements with respect to major actions significantly affecting the quality of the human environment, to the preparation of such statements, and to their circulation and review within and outside the Committee for Purchase from the Blind and Other Severely Handicapped (Hereinafter, the Committee). The procedures also provide for appropriate action with respect to environmental impact statements submitted to the Committee for comment. These procedures are to be applied in the light of the definitions and instructions in the CEQ Guidelines.

§ 51-6.2 Policy.

These procedures provide for:

(a) Designation of the official responsible for environmental impact statements.

(b) Identification of the proposed actions requiring environmental impact statements, the pertinent review process, and the time scheduling for consultations required by section 102(2)(C) of NEPA.

(c) Obtaining of the information required in the preparation of environmental impact statements.

(d) Consultation with and taking account of the comments of appropriate Federal, State, and local agencies, including the Administrator of the Environmental Protection Agency as to the environmental impact of matters under section 309 of the Clean Air Act, as amended (42 U.S.C. 1857h-7), and 1500.9(b) of the CEQ Guidelines.

(e) Making suitable arrangements as required by section 2(b) of Executive Order 11514 and 1500.6(e) of the CEQ Guidelines, for timely public information on Committee plans and programs with environmental impact, including procedures relating to (1) the use of environmental impact statements in Committee policy and action review processes, (2) the appropriate distribution of environmental impact statements, and (3) the availability to the public of environmental impact statements and comments received thereon.

§ 51-6.3 Implementation.

(a) There shall be an Environmental Quality Officer (EQO), designated, who shall be responsible for (1) identifying actions requiring an environmental impact statement; (2) making sure that each required statement is prepared timely and with the prescribed content; (3) ensuring compliance with the requirements of NEPA, the CEQ Guidelines, and these procedures; (4) maintaining compliance with all applicable scheduling, consultation, circulation, and publicity requirements; (5) receive all environmental impact statements submitted by other agencies to the Committee and coordinate the appropriate review and reply; (6) perform such other functions as are specified in these procedures or are appropriate under the CEQ Guidelines or other instructions or recommendations of CEQ. The fulfillment of these duties will require constant and active attention by the EQO to insure that the possible timely applicability of NEPA is taken into account in all relevant cases and that, if an impact statement may be needed, the requirements of the Act, the CEQ Guidelines, these procedures are promptly and fully followed.

(b) The EQO shall be responsive to requests from the CEQ for reports or other information in connection with the implementation of NEPA and for the preparation and circulation of environmental impact statements, as required by 1500.11(f) of the Guidelines. In addition to the above, all contacts with CEQ, EPA, and other governmental agencies, or with nongovernmental matters shall be through or coordinated with the EQO.

(c) Letters transmitting environmental impact statements to the CEQ (section 11(a), below), as well as any reports or other communications to the Council, shall be addressed to its Chairman and shall be signed by the Executive Director of the Committee. Communications announcing decisions to prepare environmental impact statements (section 4(c), below) or transmitting final statements for the information of agencies or persons commenting on draft statements (section 11(c), below) shall also be signed by the Executive Director and, in the case of a Federal agency, shall be addressed to its departmental EQO or equivalent official.

§ 51-6.4 Identifying major actions significantly affecting the environment.

(a) Under the Committee's responsibility as prescribed by law, the only major actions which it may take that could significantly effect the quality of the environment are those involving the addition of a commodity or service to the Procurement List established by the Committee. The Procurement List is a listing of commodities and services which Federal Government departments and agencies must procure from sheltered workshops serving the blind or other severely handicapped.

(b) The statutory clause "Major Federal Actions significantly affecting the quality of the human environment" is to be construed by the Committee with a view to the overall, cumulative impact of the action proposed, related to Federal actions and projects in the area and further actions contemplated. The Council on the basis of a writ-

ten assessment of the impact involved is available to assist in determining whether specific actions require impact statements. Significant effects can also include actions which may have both beneficial and detrimental effects, even if on balance the Committee believes that the effect will be beneficial. Significant effects also include secondary effects. While a precise definition of environmental "significance," valid in all contexts, is not possible, effects to be considered in assessing significance include, but are not limited to, those outlined in Appendix II of the guidelines. In all cases early notification shall be given by the EQO, and a determination as to the potential environmental effects of the action and the consequent need or absence of need to submit an impact statement in connection with it shall be made and, in the case of a negative determination in accordance with paragraph (f) of this section, appropriately documented. If it appears appropriate in making such a determination, agencies outside the Committee having expertise in matters involved should be consulted. Agencies with special environmental expertise are listed in Appendix II of the CEQ Guidelines. Nongovernment organizations or individuals believed to have special knowledge should also be consulted when it appears appropriate. The appraisal provided for in this paragraph shall take place as early in the Committee's consideration of the proposed action as possible (Guidelines, 1500.2(a)).

(c) When a decision to prepare an environmental impact statement on a proposed action is made, the Committee shall promptly announce this fact in the FEDERAL REGISTER (see CEQ Guidelines, 1500.6(e)).

(d) The EQO shall cause to be maintained for public inspection a list of all matters to which it has been decided to prepare an impact statement, shall consolidate the list quarterly, and as it is so revised, shall transmit it to the Council (see CEQ Guidelines, 1500.6(e)).

(e) The Committee shall determine whether a hearing should be held with respect to an environmental matter in accordance with criteria set forth in 1500.7(d) of the Guidelines. Normally, all hearings contemplated in this paragraph should be based on a draft environmental impact statement, which should in any event be made available to the public at least 15 days before the hearing.

(f) If as a result of the consideration of a proposed action as provided for by paragraph (b) of this section it is determined that no environmental impact statement is required under section 102(2)(C) of NEPA, a succinct but complete environmental assessment (negative impact statement) describing the action, the environmental impacts considered and the reasons why it has been concluded that an impact statement need not be filed shall be prepared. The EQO shall prepare such an assessment. A file of such assessments, available for public inspection, shall be maintained by the EQO (see CEQ Guidelines, 1500.6(e)).

§ 51-6.5 Time scheduling.

(a) In general, the timing of the preparation, circulation, submission, and public availability of environmental impact statements will be observed as follows:

(1) Not less than 45 days for comments on draft statements, subject to a possible extension of up to 15 days (see CEQ Guidelines, 1500.9(f);

(2) Not less than 90-day and 30-day periods, respectively, which may run concurrently, for public availability of draft and final statements prior to proposed actions (CEQ Guidelines, 1500.11(b));

(3) Not less than 15 days for public availability of draft statements prior to any relevant hearings on proposed actions (CEQ Guidelines, 1500.7(d)).

(b) The periods specified in the preceding subsection are to be calculated from the date on which the CEQ published in the FEDERAL REGISTER the weekly list in which the respective statement is included (CEQ Guidelines, 1500.11(c)).

(c) In the event of emergencies or overriding considerations of expense, the CEQ may be consulted, through the EQO, on possible variations of the specified periods (CEQ Guidelines, 1500.11(e)).

§ 51-6.6 General considerations as to utilization of impact statements.

(a) The preparation of a requisite impact statement should be undertaken as early as possible in the Committee's process of considering the respective proposal. The normal process for consideration and review of actions shall be followed, with such adjustment, particularly as to time periods, as may be necessary to permit ample fulfillment of the requirements of NEPA, the CEQ Guidelines, and these procedures (see CEQ Guidelines, 1500.3(a) and 1500.11(b)).

(b) As indicated in 1500.9(a) of the CEQ Guidelines and contemplated in section 4(b) above, a general principle to be applied is to obtain the views of other agencies at the earliest feasible time in the development of program or project proposals. Duplication in the clearance process should be avoided, but significant changes or redirections of a proposal may call for further environmental analysis and comment (CEQ Guidelines, 1500.11(b)).

§ 51-6.7 EPA procedures under the Clean Air Act.

(a) Comments from the Environmental Protection Agency (EPA) should be requested on the environmental impact of any major action significantly affecting the quality of the human environment, in areas of EPA responsibility, which include: Air or water quality, noise abatement and control, pesticide regulation, solid waste disposal, and generally applicable environmental radiation criteria and standards. (See 1500.9(b) of the CEQ Guidelines and section 309 of the Clean Air Act (42 U.S.C. 1857h-7).)

(b) Where an environmental impact statement is being filed with EPA for comment, no special additional procedure is required.

§ 51-6.8 Securing information required in preparation of environmental impact statements.

(a) All available resources should be tapped in developing the factual and analytic information and reference sources required in the preparation of an environmental impact statement. The assistance of other agencies with jurisdiction by law or special expertise concerning the environmental impacts involved should be sought. See section 4(b) above, and 1500.9(a) and Appendixes II and III of CEQ Guidelines, which list the agencies to be consulted.

(b) If the EQO has difficulty in securing requisite information or needs guidance in making the necessary analysis, he should consult with staff members of the Council on Environmental Quality, the Office of Management and Budget, and the Environmental Protection Agency, or other pertinent sources.

§ 51-6.9 Obtaining of comments on draft statements.

(a) With respect to draft environmental impact statements, it is essential that the EQO consult with and take account of the comments of appropriate Federal, State, and local agencies. Initially this consultation may take the form of informal fact finding and analytical advice in the preparation of impact statements, as contemplated in sections 4 and 8 above, but in any event, consultation shall involve the formal solicitation of review and comments on the draft statement (CEQ Guidelines, 1500.9(a)-(b)). When appropriate, the procedures set forth in Office of Management and Budget Circular No. A-95 for obtaining state and local comments through clearing houses shall be utilized (CEQ Guidelines, 1500.9(c)).

(b) Comments should also be requested from private organizations or persons which appear to have a special interest in some significant environmental aspect of the proposed action (CEQ Guidelines, 1500.9(d)).

§ 51-6.10 Content of environmental impact statements.

(a) Environmental impact statements are to provide adequate, meaningful, and factual information and analysis to permit an evaluation of the action from the environmental standpoint. Perfunctory generalities are not acceptable, but, on the other hand, information should be conveyed as succinctly and understandably as the subject will permit. Quantitative information about the proposed action, includ-

ing actual or estimated data on its probable effects, should be included to the furthest extent practicable. Where a cost-benefit analysis of the proposed action has been prepared, this analysis should be attached to the environmental impact statement sent to the commenting agencies and to the Council on Environmental Quality and made available to the public.

(b) The basic content requirements for a draft statement are set forth in 1500.8 of the CEQ Guidelines and those for a final statement in 1500.10. Appendix I of the Guidelines provides the format of a summary sheet which must accompany each draft and final statement. Statements shall follow the prescribed outline and content requirements as closely as is feasible in each particular case.

(c) All reasonable alternatives and their environmental impacts are to be discussed, regardless of whether or not they are within the authority of the Committee (CEQ Guidelines 1500.8(a)(4)).

(d) Any substantial points of view in opposition to the proposed action on environmental grounds which are known to exist shall be described in the draft statement as well as in the final statement. So far as possible, quotations of salient passages from expressions of such points of view should be included to make sure there is no doubt that they have been accurately presented. As to final statements, CEQ has directed (Guidelines 1500.10(a)) that all substantive comments (or if any is exceptionally voluminous, a summary thereof) received on the draft should be attached to each copy, whether or not each such comment is thought to merit individual discussion in the text of the statement.

(e) Each draft and final statement should refer to the underlying studies, reports and other documents considered and should indicate how such documents may be obtained. In general, with the exception of standard reference documents such as Congressional materials, the Committee should maintain a file of the respective documents which may be consulted by interested persons. Even if especially significant documents are attached to the statement, care should be taken to insure that it remains an essentially self-contained instrument easily understood by the reader without the need for undue cross reference (CEQ Guidelines, 1500.8(b)).

(f) Environmental impact statements should, to the extent possible, include statements or findings concerning environmental impact required by other statutes, such as section 106 of the National Historic Preservation Act of 1966 (16 U.S.C. Section 470f), with a view to the issuance of a single document meeting all applicable requirements. Any procedures or instructions issued by the Federal agency having jurisdiction with regard to such a statute should, of course, be consulted in the preparation of the combined statement (CEQ Guidelines 1500.9(a)).

§ 51-6.11 Filing and distribution of environmental impact statements.

(a) Five copies of each draft or final statement are to be filed with CEQ (Guidelines, 1500.11(a) and supplemental CEQ instructions of March 1, 1974).

(b) At the same time that each draft statement is filed with the Council, copies should also be sent to all pertinent entities, i.e., Federal, state, and local agencies, and private organizations and individuals (CEQ Guidelines, 1500.9).

(c) At the same time that each final statement is filed with the Council, copies should also be sent to all entities which made substantive comments on the draft statement, or requested a copy, so that they may be appropriately informed (CEQ Guidelines, 1500.10(b)).

§ 51-6.12 Availability of environmental impact statement to the public.

(a) Environmental impact statements, both draft and final, and any substantive comments thereon shall be made available to the public pursuant to the Freedom of Information Act (5 U.S.C. 552). When appropriate, copies of each statement shall also be made available through State, regional, and metropolitan clearinghouses, or such alternate point as the Governor of the respective State may designate to CEQ (Guidelines, 1500.11(d)).

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(b) A notice of the filing and availability of each environmental impact statement, draft and final, shall be inserted in the FEDERAL REGISTER. When appropriate, other methods for publicizing the existence of draft statement, such as, publishing a notice in local newspapers or sending a notice directly to non-governmental groups or persons believed to be interested (CEQ Guidelines, 1500.9(d)), should be utilized.

(c) Each statement should be reproduced in a number of copies sufficient to meet the anticipated demands, not only of agencies, organizations, and individuals who must receive copies as required by section 11 above (1500.9 and 1500.10(b) of the CEQ Guidelines), but also for a reasonable number of additional requests. Copies to be made available to the public shall normally be provided without charge, but when copies are significant, a fee may be established which shall not exceed the actual cost per copy of reproducing the copies additional to those required to be sent to other Federal agencies (CEQ Guidelines 1500.9(d)).

§ 51-6.13 Utilization of final impact statements in the decisional process.

(a) Section 102(2) of NEPA requires that the final environmental impact statement shall accompany the proposal to which it relates through the Committee's decision process.

(b) In this process pertinent non-environmental factors are to be considered and balanced with those relating to the environment. It is requisite that the entire process be based on an administrative record in which the statement is included and fully taken into account together with the relevant non-environmental factors presented in the record. Although no significant factor should be neglected, the document should give particular attention to any appreciable adverse environmental effects set forth in the impact statement and should closely, though succinctly, balance them with any other relevant interests and considerations of Federal policy set forth in the record, including particularly an analysis of the alternatives to the proposed action and their relationship to the non-environmental factors. The final decision should contain sufficient analysis to make clear the essential basis of the determination.

§ 51-6.14 Comments on statements of other agencies.

(a) As set forth in section 3(a)(vi) above and pursuant to Appendix III of the CEQ Guidelines, the EQO shall receive all environmental impact statements submitted by other agencies for comment and coordinate the appropriate review and reply. If the Committee received a request for comment direct from another agency, the request, together with the respective statement, shall be referred to the EQO for appropriate action.

(b) Comments should of course be confined to matters within the jurisdiction or expertise of the Committee. However, comments need not be limited to environmental aspects but may relate to fiscal, economic, and other non-environmental matters of concern to the Committee.

(c) At the time comments are sent to the agency responsible for a statement, five copies shall be forwarded to the CEQ by the EQO (CEQ Guidelines, 1500.11(a)). Copies of replies indicating that the Committee has no comment on an impact statement should not be forwarded to the CEQ.

(d) With regard to requests for comment on statements relating to proposals for legislation, close coordination shall be maintained between the EQO and the Committee's counsel in relation to the latter's normal responsibility concerning the Committee's comments on legislative proposals themselves.

PART 51-7—PUBLIC AVAILABILITY OF AGENCY MATERIALS

Sec.

51-7.1 Purpose.
51-7.2 Scope.
51-7.3 Definitions.
51-7.4 Availability of materials.
51-7.5 Administrative appeal.
51-7.6 Extensions of time.
51-7.7 Fees.

AUTHORITY: 5 U.S.C. 552.

SOURCE: 41 FR 18079, Apr. 30, 1976, unless otherwise noted.

§ 51-7.1 Purpose.

These regulations implement the provisions of the "Freedom of Information Act," 5 U.S.C. 552. They establish procedures under which the public may inspect and obtain copies of nonexempt material maintained by the Committee, provide for administrative appeal of initial determinations to deny requests for material, and prescribe uniform fees to be charged by the Committee to recover direct search and duplication costs.

§ 51-7.2 Scope.

(a) These regulations shall apply to all final determinations made by the Committee including all objections; and to any other Committee records reasonably described and requested by a person in accordance with these regulations—except to the extent that such material is exempt in accordance with paragraph (b) of this section.

(b) Requests for inspection and copies shall not be granted with respect to materials that are:

(1)(i) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and

(ii) Are in fact properly classified pursuant to such Executive Order;

(2) Related solely to the internal personnel rules and practices of the Committee;

(3) Specifically exempted from disclosure by statute;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Committee;

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would

(i) Interfere with enforcement proceedings,

(ii) Deprive a person of a right to a fair trial or an impartial adjudication,

(iii) Constitute an unwarranted invasion of personal privacy,

(iv) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,

(v) Disclose investigative techniques and procedures, or

(vi) Endanger the life or physical safety of law enforcement personnel;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

§ 51-7.3 Definitions.

As used in these regulations:

(a) The term "Committee" means the Committee for Purchase from the Blind and Other Severely Handicapped.

(b) The term "Chairman" means the Chairman of the Committee for Purchase from the Blind and Other Severely Handicapped.

(c) The term "exempt materials" means those materials described in § 51-7.2(b) of this part.

(d) The term "non-exempt materials" refers to all materials described in § 51-7.2(a), but not included in § 51-7.2(b) of this part.

§ 51-7.4 Availability of materials.

(a) All non-exempt materials shall be available for inspection during normal business hours at the Committee's offices, 2009 Fourteenth Street North, Suite 610, Arlington, Virginia 22201. Space shall be made available at that location for the use of any person who is granted permission to inspect such materials. An individual who intends to visit the Committee of-

fices in person who is granted permission to inspect non-exempt materials should make an appointment with the Executive Director at least one week in advance.

(b) Requests to inspect, and obtain copies of any material maintained by the Committee may be made in person at the Committee offices, or submitted in writing to the Executive Director, 2009 Fourteenth Street North, Suite 610, Arlington, Virginia 22201. Each request should include a reasonable description of the material being sought, and should contain sufficient detail to facilitate retrieval of the material without undue delay. The Committee staff shall assist to the extent practicable in identifying material that is imprecisely described by the person requesting such material.

(c) An initial determination whether, and to what extent, to grant each request shall be made by the Executive Director or his delegate within 10 days (excepting Saturdays, Sundays, and legal public holidays) after receipt of that request. The person making the request shall be notified immediately of the determination, made. In making such determinations, it shall first be considered whether the material requested is of a type described in § 51-7.2(a) of this part; if it is, the request shall be granted unless the material is exempted by § 51-7.2(b) of this part. If the materials requested is not a type described in § 51-7.2(a) of this part, or is the subject of one or more exemptions, the request shall be denied.

(d) If a determination is made to grant a request, the relevant material shall promptly be made available for inspection at the Committee offices. Copies of the material disclosed shall be furnished within a reasonable time after payment of the fee specified in § 57-7.7 of this part. Copies of less than 10 pages of material requested in person ordinarily will be furnished immediately following the determination to grant the request and payment of the fee. Larger numbers of copies may be furnished at the earliest convenience of the Committee staff, but must be furnished within a reasonable time following payment of the fee.

(e) Whenever required to prevent a clearly unwarranted invasion of personal privacy, the Executive Director or his delegate shall determine that identifying details shall be deleted from an interpretation to which access is granted or of which copies are furnished. Where portions of the requested material are exempt under § 57-7.2(b) of this part, and are reasonably segregable from the remainder of the material, those portions shall be excised from the materials disclosed. Whenever details are deleted or portions are excised and not disclosed, the notification shall include the information specified in § 57-7.4(f) of this part.

(f) If a determination is made to deny a request, the notification shall include a statement of the reasons for such action, shall set forth the name and position of the person responsible for the denial, and shall advise the requester of the right, and the procedures required under § 57-7.5 of this part to appeal the denial to the Chairman.

§ 51-7.5 Administrative appeal.

(a) An appeal to the Chairman of any denial, in whole or part, of a request for access to and copies of material may be made by submission of a written request for reconsideration. Such requests must state specific reasons for reconsideration that address directly the grounds upon which the denial was based. Requests should be addressed to the Chairman at the Committee offices.

(b) The Chairman shall make a determination with respect to any appeal within 20 days (excepting Saturdays, Sundays, and legal public holidays) after receipt of the request for reconsideration. The person making such a request shall immediately be notified by mail of the determination.

(c) If the initial denial is reversed by the Chairman, any material with which the reversal is concerned shall be made available for inspection, and copies shall be furnished, in accordance with § 57-7.4(d) of this part.

(d) If the denial is upheld, in whole or in part, the Chairman shall include in the notification a statement of the requester's right of judicial review under 5 U.S.C. 552(a)(4), and the

names and positions of the persons responsible for the denial.

§ 51-7.6 Extensions of time.

(a) Whenever unusual circumstances exist, as set forth in § 57-7.6(b) of this part, the times within which determinations must be made by the Executive Director on requests for access (10 working days), and by the Chairman on requests for reconsideration (20 working days), may be extended by written notice to the requester. The notice shall set forth the reasons for such extension, and the date on which a determination is expected to be made. The maximum extension of time allowed under this section shall be 10 working days, but shall be utilized only to the extent reasonably necessary to the proper processing of the particular request.

(b) As used in this section, "unusual circumstances" shall mean:

(1) The need to search for and collect the requested records from other establishments that are separate from the Committee offices;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are the subject of a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request.

§ 51-7.7 Fees.

The following standard charges for document search and duplication, based on the direct costs of such services, must be paid before access to, or copies of material will be granted under these regulations:

(a) Search. $4.00 per person-hour for clerical time; $8.00 per person-hour for professional or supervisory time.

(b) Duplication. $0.10 per page of photocopied material.

(c) Other. When no specific fee has been established for a service, the Executive Director is authorized to establish an appropriate fee based on "direct costs" as provided in the Freedom of Information Act.

(d) The Committee shall furnish without charge, or at a reduced charge, copies of any material disclosed pursuant to these regulations, whenever the Executive Director determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

PART 51-8—PRIVACY ACT RULES

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Subpart 51-8.7—Rules of Conduct for Disclosure of Information About an Individual

51-8.701 Committee rules of conduct.

AUTHORITY: Pub. L. 93-579, December 31, 1974; 5 U.S.C. 552a.

SOURCE: 40 FR 51168, Nov. 3, 1975, unless otherwise noted.

Subpart 51-8.1—General Policy

§ 51-8.101 Maintenance of records.

§ 51-8.101-1 Collection and use.

Any information used in whole or in part in making a determination about an individual's rights, benefits, or privileges under the Committee programs, shall, to the extent practicable, be collected directly from the subject individual. At the time information is collected, the individual must be informed of the authority for collecting such information, whether providing the information is mandatory or voluntary, the purposes for which the information will be used, the routine uses as published in the FEDERAL REGISTER, and the effects on the individual, if any, of not providing the information. The information collected shall be used only for the intended purpose or permission for additional use will be obtained from the subject individual.

§ 51-8.101-2 Standards of accuracy.

The Executive Director shall ensure that all records which are used by the agency to make determinations about any individual are maintained with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual. Upon petition by an individual, the Executive Director shall provide the individual with the opportunity to review his records, and to request amendment of a portion which the individual believes is not accurate, relevant, timely or complete. Prior to dissemination of records about any individual to any person or to another agency, exclusive of disclosure pursuant to the Freedom of Information Act, the Executive Director shall make reasonable effort to ensure that such records are accurate, complete, timely, and relevant.

§ 51-8.101-3 Content of systems of records.

The Executive Director shall maintain in records only such information about an individual as is relevant and necessary to accomplish an agency purpose required by statute or executive order. Such records shall not contain any information describing how any individual exercises rights guaranteed by the First Amendment unless specifically authorized by statute, by the subject individual, or is pertinent to and within the scope of an authorized law enforcement activity. For these purposes, First Amendment rights include, but are not limited to, religious and political beliefs, freedom of speech, the press, assembly, and freedom to petition.

§ 51-8.101-4 Rules of conduct.

Any employee of the Committee involved in the design, development, operation or maintenance of any system of records, or in maintaining any record, shall review the provisions of 5 U.S.C. 552a and these regulations, and shall conduct himself accordingly with the rules of conduct concerning the protection of personal information outlined in 41 CFR 51-8.7, Disclosure of Information about an Individual.

§ 51-8.101-5 Safeguarding systems of records.

The Executive Director shall ensure that appropriate administrative, technical and physical safeguards are established to ensure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.

§ 51-8.102 Availability of records.

Committee records pertaining to an individual shall be made available to the subject individual to the greatest extent possible. Disclosures of records to other than the subject individual will be made only in accordance with Subpart 51-8.2 of this part.

§ 51-8.102-1 Specific exemptions.

Systems of records maintained by the Committee which have been exempted from certain requirements of the Privacy Act are designated in Subpart 51-8.6 of this part. An individual shall have access to all exempted records containing information about him under procedures outlined in Subpart 51-8.3 of this part. Upon request, an individual shall receive an accounting of any disclosure of information about him.

Subpart 51-8.2—Disclosure of Records

§ 51-8.201 Conditions of disclosure.

No Committee member or employee of the Committee shall disclose any record to any person or to another agency without the express written consent of the subject individual unless the disclosure is:

(a) To Committee members or employees who have a need for the information in the official performance of their duties.

(b) Required under the provisions of the Freedom of Information Act.

(c) For a routine use as published in the annual notice in the FEDERAL REGISTER.

(d) To the Bureau of Census for uses pursuant to Title 13.

(e) To a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record and the record is to be transferred in a form that is not individually identifiable. The written statement should include as a minimum:

(1) A statement of the purpose for requesting the records, and

(2) Certification that the records will be used only for statistical purposes. These written statements shall be maintained as records. In addition to stripping, personally identifying information from records released for statistical purpose, the Committee will ensure that the identity of the individual cannot reasonably be deducted by combining various statistical records.

(f) To the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value.

(g) To another agency or instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought.

(h) To a person showing compelling circumstances affecting the health and safety of an individual (not necessarily the individual to whom the record pertains). Upon such disclosure, a notification of such shall be sent to the last known address of the individual.

(i) To either House of Congress or to a subcommittee or committee (joint or of either House, to the extent that the subject matter falls within their jurisdiction).

(j) To the Comptroller General, or any of his authorized representatives in the course of the performance of the duties of the General Accounting Office, or

(k) Pursuant to the order of the court of competent jurisdiction.

§ 51-8.202 Accounting of disclosures.

(a) Except for disclosures made pursuant to paragraphs (a) and (b) of § 51-8.201 of this part, an accurate accounting of each disclosure will be made and retained for five years after the disclosure or for the life of the record, whichever is longer. The ac-

counting will include the date, nature, and purpose of each disclosure, and the name and address of the person or agency to whom the disclosure is made.

(b) The accounting will be recorded and maintained in any manner the Executive Director determines is satisfactory for the purposes of constructing a listing of all disclosures, and for providing a cross reference to the justification or basis upon which the disclosure was made, including written documentation required when records are released for statistical or law enforcement purposes and any written consents provided by the individual.

(c) Except for disclosures made to agencies or instrumentalities in law enforcement activities in accordance with § 51-8.201(e)(2) or for disclosures made from systems exempted from this requirement of the Act as outlined in Subpart 51-8.6 of this part, the accounting of disclosures will be made available to the individual upon request. Procedures for requesting access to the accounting are outlined in Subpart 51-8.3 of this part.

Subpart 51-8.3—Individual Access to Records

§ 51-8.301 Notification.

Any individual who wishes to determine if a system of records maintained by the Committee contains a record pertaining to him should direct a request to the Executive Director at the address indicated in the public notice describing the system of records which has been published in the FEDERAL REGISTER. The request should display clearly the legend "Privacy Act Request" both on the face of the request letter and on the face of the envelope. The request letter should contain the complete name and identifying number of the system as published in the FEDERAL REGISTER; the full name, address, and telephone number of the subject individual; a brief description of the nature, time, place and circumstances of the individual's association with the Committee and any other information which the individual believes would facilitate the Executive Director's determination whether the individual's name is included in the system of records. The Executive Director shall answer or acknowledge the request within ten working days.

§ 51-8.302 Times, places and requirements for access requests.

Records will be available for authorized access during normal business hours at the offices where the records are located. A requester should be prepared to identify himself through production of a driver's license, student or employee identification card, or other identification acceptable to the Executive Director. When the disclosure of records to the wrong individual would result in substantial harm, embarrassment, inconvenience, or unfairness to the subject individual, the Executive Director may require a notarized statement of identity. The Executive Director shall ensure that such times, places, and requirements for identification are not excessive and do not restrict individual access unduly.

§ 51-8.303 Access procedures.

§ 51-8.303-1 Form of requests.

(a) An individual must request access to his record in writing. The Executive Director shall accept by telephone only general inquiries for information regarding systems of records or procedures.

(b) A written request should be directed to the Executive Director as listed in the public notice describing the system of records. The individual should display clearly on the face of the request letter and on the face of the envelope the legend "Privacy Act Request", and include the complete name and identifying number of the system as published in the FEDERAL REGISTER; the full name, address, the telephone number of the individual; a brief description of the nature, time, place and circumstances of the individual's association with the Committee; and any other information which the individual believes would facilitate the Executive Director's search for the record.

(c) An individual who wishes to have a person of his choosing accompany him in reviewing a record must sign a statement authorizing the disclosure of his record in the presence of an-

other individual, if so requested by the Executive Director. An individual who intends to visit the Committee office in order to review a record should make an appointment with the Executive Director at least one week in advance.

§ 51-8.303-2 Special requirements for medical/psychological records.

(a) The Executive Director may require an individual who requests access to his medical or psychological record to designate a physician of his choice to whom he may disclose the individual's record if in the opinion of the Executive Director, disclosure directly to the individual might be harmful.

(b) The Executive Director shall mark records which should not be disclosed directly to the subject individual and shall inform an individual requesting such records of the requirement to designate a physician to whom the records can be disclosed.

§ 51-8.303-3 Granting access.

(a) Upon receipt of a request for access to non-exempt records, the Executive Director shall make such records available to the individual, or shall acknowledge the request within ten working days. The acknowledgment shall indicate when the Executive Director will make the record available.

(b) If the Executive Director anticipates more than ten days in making a record available he also shall include in the acknowledgement specific reasons for the delay.

(c) If an individual's request for access does not contain sufficient information to permit the Executive Director to locate the record, the Executive Director shall request additional information from the individual and shall have ten working days following receipt of the additional information in which to make the record available, or to acknowledge receipt of the request and indicate when the record will be available. In no case shall more information be requested from the individual than that contained in the pertinent system of records.

(d) The Executive Director, at his discretion, either shall permit an individual to examine the original of the record, or shall provide the individual with a copy of the record. Fees shall be charged only for copies requested by the individual and not for copies provided to the individual for convenience of the agency.

(e) An individual may request to pick up a record in person or receive it by mail, directed to the name and address provided by the individual in his request. The Executive Director shall not make a record available to a third party for delivery to the subject individual, except in the case of medical records outlined in § 51-8.303-2.

(f) The Executive Director shall maintain in an individual's record an accounting of disclosures to the individual's documenting compliance with the request.

(g) The procedures for access to an accounting of disclosures is identical to the procedure for access to a record as set forth in this section.

§ 51-8.303-4 Denials of access.

(a) The Executive Director may deny any individual access to his record only on the grounds that the Committee has published rules in the FEDERAL REGISTER exempting the pertinent system of records from the access requirement.

(b) Upon receipt of a request for access to an exempt system, the Executive Director shall prepare a letter denying access. The letter of denial shall contain a justification for denial of access which includes appropriate citation to the exemption provisions of these rules or other FEDERAL REGISTER notice exempting the system.

§ 51-8.304 Fees.

§ 51-8.304-1 Records available without charge.

The Executive Director shall make one copy of a record available to an employee without charge, and may waive the fee requirement for any other individual requesting records if the cost of collecting the fee is an unduly large part of, or greater than, the fee, or when furnishing the record without charge conforms to generally established business custom or is in the public interest.

§ 51-8.304-2 Records available at a fee.

The Executive Director shall provide one copy of a record to the individual at a fee prescribed in § 51-8.304-5. A reasonable number of additional copies will be provided for the applicable fee where reproduction services are not readily available.

§ 51-8.304-3 Prepayment of fees over $25.

When the Executive Director determines that the anticipated total fee is likely to exceed $25, he shall notify the individual that he must prepay the anticipated fee prior to making the records available. The Committee will remit the excess paid by the individual or bill the individual for an additional amount according to variations between the final fee charged and the amount prepaid.

§ 51-8.304-4 Form of payment.

Payment shall be by check or money order payable to the Committee for Purchase from the Blind and Other Severely Handicapped and shall be addressed to the Executive Director.

§ 51-8.304-5 Reproduction fee schedule.

(a) The fee for reproducing a copy of a record (by routine electrostatic copying) up to and including material 8½ x 14 inches shall be $0.10 per page.

(b) The fee for reproducing a copy of a record over 8½ x 14 inches or whose physical characteristics do not permit reproduction by routine electrostatic copying shall be the direct cost of reproducing the records through Government or commercial sources.

Subpart 51-8.4—Requests To Amend Records

§ 51-8.401 Submission of requests to amend records.

(a) An individual who desires to amend any record or information pertaining to him should direct a written request to the Executive Director, Committee for Purchase from the Blind and Other Severely Handicapped, 2009 14th Street, N., Arlington, Virginia 22201.

(b) A request should bear the legend "Privacy Act—Request to Amend Record" prominently marked on both the face of the request letter and the envelope.

§ 51-8.402 Review of requests to amend records.

(a) Upon receipt of a request to amend a record, the responsible official, whenever practicable shall complete the review and advise the individual of the results within ten working days. If a determination cannot be made within ten working days, the Executive Director, within ten working days, shall send the individual a written acknowledgment of receipt of the request including a description of the request and the date when the requester may except to be advised of action taken on the request. Except in unusual circumstances, the Executive Director shall complete the review within 30 working days. In unusual circumstances, causing delay beyond the 30 day limit, the Executive Director shall inform the individual in writing of the cause of delay, the actions taken to review the record, and the date the Executive Director anticipates the review to be complete.

(b) When reviewing a record in response to a request to amend, the Executive Director shall assess the accuracy, relevance, timeliness, and completeness of the record to ensure fairness to the individual in any determination made on the basis of the record. With respect to a request to delete information, the Executive Director also shall review the request and record to determine whether the information is relevant and necessary to accomplish an agency purpose required to be accomplished by law or Executive Order.

§ 51-8.403 Approval of requests to amend.

If the Executive Director agrees to amend a record, he promptly shall make the necessary corrections to the record and shall send a copy of the corrected record to the individual. Where an accounting of disclosure has been maintained, he shall advise all previous recipients of the record of the fact that a correction was made of/and the substance of the correction. Where practicable, the Executive

Director shall send a copy of the corrected record to previous recipients.

§ 51-8.404 Refusal of request to amend.

(a) The Executive Director, or any official acting for him, shall have the authority to issue an initial refusal of a request to amend a record within his custody and shall be responsible for the initial adverse agency determination.

(b) If the Executive Director, after reviewing the request to amend a record, determines not to amend the record, he promptly shall advise the requester in writing of the determination. The refusal letter (1) shall state the reasons for refusal, (2) shall state the requester's right to seek a review of the initial determination, and (3) shall state the procedures for requesting such review.

§ 51-8.405 Request of review of refusal to amend a record.

(a) An individual who disagrees with the refusal to amend may appeal that refusal with the Committee. An individual should address a request for review of a refusal to amend any record, exclusive of a personnel record of a current Committee employee to the Chairman, Committee for Purchase from the Blind and Other Severely Handicapped, 2009 14th Street N., Suite 610, Arlington, Virginia 22201.

(b) A request to review must be in writing and should include a copy of the initial request and refusal to amend. The request to review should bear the legend "Privacy Act—Request for Review of Refusal to Amend" on both the face of the letter and the envelope. The Chairman shall complete the review and make a determination no later than 30 working days after receipt of the request for review, unless a determination is made to extend the 30 day period. If a determination is made to extend the 30 day period, the Chairman shall notify the requester in writing of the reasons for the delay and the date when the review will be completed.

(c) Upon receipt of a request to review a refusal to amend, the Chairman shall undertake an independent review of the request and initial determination. If, after conducting the review, the Chairman agrees to amend, he shall notify the requester promptly in writing of the determination, amend the record, and notify previous recipients in accordance with § 51-8.403.

(d) If, after conducting the review, the Chairman agrees with the refusal to amend the record, he shall notify the requester promptly in writing of the determination. The notification shall include the reasons for the refusal, and shall advise the individual of his right to file a statement of disagreement, and the procedures for doing so. The Chairman also shall advise the individual that such statement of disagreement will be made available in any subsequent disclosures of the record together with a concise statement summarizing reasons for refusal where the responsible official deems it appropriate. The Chairman also will advise the individual of his right to bring civil action against the agency in a district court of the United States.

Subpart 51-8.5—Report on New Systems and Alteration of Existing Systems

§ 51-8.501 Reporting requirement.

(a) No later than 30 days prior to the establishment of a new systems of records, the Executive Director shall submit a copy of the proposal to the President of the Senate, the Speaker of the House of Representatives, and the Director of the Office of Management and Budget for their evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals of the disclosure of information relating to such individuals.

(b) No later than 30 days prior to the alteration of a system of records, the Executive Director for the maintenance of that system of records shall submit a copy of the proposal to the President of the Senate, the Speaker of the House of Representatives, and the Director of the Office of Management and Budget for their evaluation of the probable or potential effect of such proposal on the privacy and

other personal or property rights of individuals of the disclosure of information relating to such individuals.

§ 51-8.502 Federal Register notice of establishment of new system or alteration of existing system.

(a) When the Executive Director receives notice that the Senate, the House of Representatives, and the Office of Management and Budget do not object to the establishment of a new system of records, or the alteration of an existing system of records, or

(b) When no fewer than 30 days elapse from the submission of the proposal to the Senate, the House of Representatives, and the Office of Management and Budget, without receipt by the Executive Director of an objection to the proposal, then a notice shall be published in the FEDERAL REGISTER of the proposed establishment or alteration of a system of records. The notice shall include all of the information required to be provided by the Privacy Act of 1974, and such other information as deemed necessary.

§ 51-8.503 Effective date of new systems of records or alteration of an existing system of records.

Systems of records proposed to be established or altered in accordance with the provision of the subpart shall be effective no sooner than 30 days from the publication of notice required by § 51-8.502.

Subpart 51-8.6—Exemptions [Reserved]

Subpart 51-8.7—Rules of Conduct for Disclosure of Information About an Individual

§ 51-8.701 Committee rules of conduct.

(a) Every Committee member and employee who is involved in the design, development, operation, or maintenance of a system of records, or who has access to a system of records, shall familiarize himself with the requirements of the Privacy Act of 1974 (5 U.S.C. 552a) and the Committee regulations and orders issued thereunder and apply these requirements to all systems of records.

(b) No Committee member or employee shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of the individual to whom the record pertains, unless the disclosure would be to a recipient specified in paragraph (c) of this section. The term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. The term "system of records" means a group of any records under the control of the Committee from which information is retrieved by the name of the individual or by some identifying number symbol, or other identifying particular assigned to the individual. The term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected. The term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence. The term "agency" is defined in 5 U.S.C. 552(e).

(c) An employee may disclose any record which is contained in a system of records, without a written request by and without the prior written consent of the individual to whom the record pertains, if the disclosure would be:

(1) To those Committee members and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) Required under section 552 of Title 5 U.S.C.;

(3) For a routine use as described in paragraph (b) of this section;

(4) To the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity

pursuant to the provisions of Title 13 U.S.C.;

(5) To a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) To the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) To a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) To either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) To the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) Pursuant to the order of a court of competent jurisdiction.

(d) No Committee member or employee shall maintain a record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.

(e) No Committee member or employee shall sell or rent an individual's name and address unless such action is specifically authorized by law.

(f) A Committee member or employee, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by paragraph a of this section or by any other rules or regulations established under the Privacy Act of 1974, and who (1) knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, or (2) willfully maintains a system of records without meeting the notice requirements of the Privacy Act of 1974, or (3) knowingly and willfully requests or obtains any record concerning an individual from any agency under false pretenses, is subject to criminal penalties and administrative sanctions. Any Committee member or employee who (i) makes a determination not to amend an individual's record in accordance with the Privacy Act of 1974, or (ii) refuses to comply with an individual's request to gain access to review, and obtain a copy of any information pertaining to him, or (iii) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities or of benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual, or (iv) fails to comply with any provision of the Privacy Act of 1974 or any Committee regulation implementing it, subjects the Committee to civil penalties and himself to administrative sanctions.

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CHAPTER 60—OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, EQUAL EMPLOYMENT OPPORTUNITY, DEPARTMENT OF LABOR

NOTE: The President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), directed Federal agencies to postpone for sixty days from January 29, 1981, the effective date of all regulations that they had promulgated in final form and had scheduled to become effective during such sixty day period. (See also Executive Order 12291, 46 FR 13193, Feb. 19, 1981.)

The text set forth below is in effect on the revision date of this volume (July 1, 1982). The effective date of the text printed in the Appendix appearing in the Finding Aids section of this volume was postponed indefinitely at 46 FR 42865, Aug. 25, 1981 (Parts 60-1, 60-2, 60-4, 60-20, 60-30, 60-50, 60-250, and 60-741). In order to determine the effective text at any date after August 25, 1981, the user must consult the Rules and Regulations section of the daily FEDERAL REGISTER for further action on these regulations.

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PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

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AUTHORITY: Sec. 201, E.O. 11246 (30 FR 12319), as amended by E.O. 12086.

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Subpart A—Preliminary Matters; Equal Opportunity Clause; Compliance Reports

§ 60–1.1 Purpose and application.

The purpose of the regulations in this part is to achieve the aims of parts II, III, and IV of Executive Order 11246 for the promotion and insuring of equal opportunity for all persons, without regard to race, color, religion, sex, or national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts. The regulations in this part apply to all contracting agencies of the Government and to contractors and subcontractors who perform under Government contracts, to the extent set forth in this part. The regulations in this part also apply to all agencies of the Government administering programs involving Federal financial assistance which may include a construction contract, and to all contractors and subcontractors performing under construction contracts which are related to any such programs. The procedures set forth in the regulations in this part govern all disputes relative to a contractor's compliance with his obligations under the equal opportunity clause regardless of whether or not his contract contains a "Disputes" clause. Failure of a contractor or applicant to comply with any provision of the regulations in this part shall be grounds for the imposition of any or all of the sanctions authorized by the order. The regulations in this part do not apply to any action taken to effect compliance with respect to employment practices subject to title VI of the Civil Rights Act of 1964. The rights and remedies of the Government hereunder are not exclusive and do not affect rights and remedies provided elsewhere by law, regulation, or contract; neither do the regulations limit the exercise by the Secretary or Government agencies of powers not herein specifically set forth, but granted to them by the order.

§ 60-1.2 Administrative responsibility.

The Director has been delegated authority and assigned responsibility for carrying out the responsibilities assigned to the Secretary under the Executive order. All correspondence regarding the order should be directed to the Director, Office of Federal Contract Compliance Programs, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210.

§ 60-1.3 Definitions.

"Administering agency" means any department, agency and establishment in the executive branch of the Government, including any wholly owned Government corporation, which administers a program involving federally assisted construction contracts.

"Administrative law judge" means an administrative law judge appointed as provided in 5 U.S.C. 3105 and Subpart B of Part 930 of Title 5 of the Code of Federal Regulations (see 37 FR 16787) and qualified to preside at hearings under 5 U.S.C. 557.

"Agency" means any contracting or any administering agency of the Government.

"Applicant" means an applicant for Federal assistance involving a construction contract, or other participant in a program involving a construction contract as determined by regulation of an administering agency. The term also includes such persons after they become recipients of such Federal assistance.

"Construction work" means the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.

"Contract" means any Government contract or any federally assisted construction contract.

"Contracting agency" means any department, agency, establishment, or instrumentality in the executive branch of the Government, including any wholly owned Government corporation, which enters into contracts.

"Contractor" means, unless otherwise indicated, a prime contractor or subcontractor.

"Director" means the Director, Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor or any person to whom he delegates authority under the regulations in this chapter.

"Equal opportunity clause" means the contract provisions set forth in § 60-1.4 (a) or (b), as appropriate.

"Federally assisted construction contract" means any agreement or modification thereof between any applicant and a person for construction work which is paid for in whole or in part with funds obtained from the Government or borrowed on the credit of the Government pursuant to any Federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work.

"Government" means the government of the United States of America.

"Government contract" means any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements. The term "services", as used in this section includes, but is not limited to the following services: Utility, construction, transportation, research, insurance, and fund depository. The term "Government contract" does not include (1) agreements in which the parties stand in the relationship of employer and employee, and (2) federally assisted construction contracts.

"Minority group" as used herein shall include, where appropriate, female employees and perspective female employees.

"Modification" means any alteration in the terms and conditions of a con-

[illegible]

tract, including supplemental agreements, amendments, and extensions.

"Order," "Executive Order," or "Executive Order 11246" means parts II, III, and IV of the Executive Order 11246 dated September 24, 1965 (30 FR 12319), any Executive order amending such order, and any other Executive order superseding such order.

"Person" means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

"Prime contractor" means any person holding a contract and, for the purposes of Subpart B of this part, any person who has held a contract subject to the order.

"Recruiting and training agency" means any person who refers workers to any contractor or subcontractor or who provides for employment by any contractor or subcontractor.

"Rules, regulations, and relevant orders of the Secretary of Labor" used in paragraph (4) of the equal opportunity clause means rules, regulations, and relevant orders of the Secretary of Labor or his designee issued pursuant to the order.

"Secretary" means the Secretary of Labor, U.S. Department of Labor.

"Site of construction" means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair and any temporary location or facility at which a contractor, subcontractor, or other participating party meets a demand or performs a function relating to the contract or subcontract.

"Subcontract" means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.

"Subcontractor" means any person holding a subcontract and, for the purposes of Subpart B of this part, any person who has held a subcontract subject to the order. The term "First-tier subcontractor" refers to a subcontractor holding a subcontract with a prime contractor.

"United States" as used herein shall include the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Panama Canal Zone, and the possessions of the United States.

§ 60-1.4 Equal opportunity clause.

(a) *Government contracts.* Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its Government contracts (and modifications thereof if not included in the original contract):

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or

workers' representative of the contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) the contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(b) *Federally assisted construction contracts.* (1) Except as otherwise provided, each administering agency shall require the inclusion of the following language as a condition of any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of the equal opportunity clause:

The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contrator will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the

Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* That in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: *Provided,* That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

(c) *Subcontracts.* Each nonexempt prime contractor or subcontractor shall include the equal opportunity clause in each of its nonexempt subcontracts.

(d) *Incorporation by reference.* The equal opportunity clause may be incorporated by reference in all Government contracts and subcontracts, including Government bills of lading, transportation requests, contracts for deposit of Government funds, and contracts for issuing and paying U.S. savings bonds and notes, and such other contracts and subcontracts as the Director may designate.

(e) *Incorporation by operation of the Order.* By operation of the Order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.

(f) *Adaptation of language.* Such necessary changes in language may be made in the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings.

§ 60-1.5 Exemptions.

(a) *General*—(1) *Transactions of $10,000 or under.* Contracts and subcontracts not exceeding $10,000, other than Government bills of lading, and other than contracts and subcontracts with depositories of Federal funds in any amount and with financial institutions which are issuing and paying agents for U.S. savings bonds and savings notes, are exempt from the requirements of the equal opportunity clause. In determining the applicability of this exemption to any federally assisted construction contract, or subcontract thereunder, the amount of such contract or subcontract rather than the amount of the Federal financial assistance shall govern. No agency, contractor, or subcontractor shall procure supplies or services in a manner so as to avoid applicability of the equal opportunity clause: *Provided*, that where a contractor has contracts or subcontracts with the Government in any 12-month period which have an aggregate total value (or can reasonably be expected to have an aggregate total value) exceeding $10,000, the $10,000 or under exemption does not apply, and the contracts are subject to the order and the regulations issued pursuant thereto regardless of whether any single contract exceeds $10,000.

(2) *Contracts and subcontracts for indefinite quantities.* With respect to contracts and subcontracts for indefinite quantities (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, "call-type" contracts, and purchase notice agreements), the equal opportunity clause shall be included unless the purchaser has reason to believe that the amount to be ordered in any year under such contract will not exceed $10,000. The applicability of the equal opportunity clause shall be determined by the purchaser at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall be applied to such contract whenever the amount of a single order exceeds $10,000. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) *Work outside the United States.* Contracts and subcontracts are exempt from the requirements of the equal opportunity clause with regard to work performed outside the United States by employees who were not recruited within the United States.

(4) *Contracts with State or local governments.* The requirements of the equal opportunity clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract. In addition, any agency, instrumentality or subdivision of such government, except for educational institutions and medical facilities, are exempt from the requirements of filing the annual compliance report provided for by § 60-1.7(a)(1) and maintaining a written affirmative action compliance program prescribed by § 60-1.40 and Part 60-2 of this chapter.

(5) *Contracts with certain educational institutions.* It shall not be a violation of the equal opportunity clause for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion. The primary thrust of this provision is directed at religiously oriented church-related colleges and universities and should be so interpreted.

(6) *Work on or near Indian reservations.* It shall not be a violation of the equal opportunity clause for a construction or nonconstruction contractor to extend a publicly announced

preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. The use of the word "near" would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such a preference shall not excuse a contractor from complying with the other requirements contained in this chapter.

(b) *Specific contracts and facilities*—(1) *Specific contracts.* The Director may exempt an agency or any person from requiring the inclusion of any or all of the equal opportunity clause in any specific contract or subcontract when he deems that special circumstances in the national interest so require. The Director may also exempt groups or categories of contracts or subcontracts of the same type where he finds it impracticable to act upon each request individually or where group exemptions will contribute to convenience in the administration of the order.

(2) *Facilities not connected with contracts.* The Director may exempt from the requirements of the equal opportunity clause any of a prime contractor's or subcontractor's facilities which he finds to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, provided that he also finds that such an exemption will not interfere with or impede the effectuation of the order.

(c) *National security.* Any requirement set forth in these regulations in this part shall not apply to any contract or subcontract whenever the head of an agency determines that such contract or subcontract is essential to the national security and that its award without complying with such requirement is necessary to the national security. Upon making such a determination, the head of the agency will notify the Director in writing within 30 days.

(d) *Withdrawal of exemption.* When any contract or subcontract is of a class exempted under this section, the Director may withdraw the exemption for a specific contract or subcontract or group of contracts or subcontracts when in his judgment such action is necessary or appropriate to achieve the purposes of the order. Such withdrawal shall not apply to contracts or subcontracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

[43 FR 49240, Oct. 20, 1978; 43 FR 51400, Nov. 3, 1978]

§ 60-1.6 [Reserved]

§ 60-1.7 Reports and other required information.

(a) *Requirements for prime contractors and subcontractors.* (1) Each prime contractor and subcontractor shall file annually, on or before the 31st day of March, complete and accurate reports on Standard Form 100 (EEO-1) promulgated jointly by the Office of Federal Contract Compliance Programs, the Equal Employment Opportunity Commission and Plans for Progress or such form as may hereafter be promulgated in its place if such prime contractor or subcontractor (i) is not exempt from the provisions of these regulations in accordance with § 60-1.5; (ii) has 50 or more employees; (iii) is a prime contractor or first tier subcontractor; and (iv) has a contract, subcontract or purchase order amounting to $50,000 or more or serves as a depository of Government funds in any amount, or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes: *Provided,* That any subcontractor below the first tier which performs construction work at the site of construction shall be required to file such a report if it meets requirements of paragraphs (a)(1) (i), (ii), and (iv) of this section.

(2) Each person required by § 60-1.7(a)(1) to submit reports shall file such a report with the contracting or administering agency within 30 days after the award to him of a contract or subcontract, unless such person has submitted such a report within 12 months preceding the date of the award. Subsequent reports shall be submitted annually in accordance with § 60-1.7(a)(1), or at such other intervals as the Director may require. The Director may extend the time for filing any report.

(3) The Director or the applicant, on their own motions, may require a contractor to keep employment or other records and to furnish, in the form requested, within reasonable limits, such information as the Director or the applicant deems necessary for the administration of the order.

(4) Failure to file timely, complete and accurate reports as required constitutes noncompliance with the prime contractor's or subcontractor's obligations under the equal opportunity clause and is ground for the imposition by the Director, an applicant, prime contractor or subcontractor, of any sanctions as authorized by the order and the regulations in this part.

(b) *Requirements for bidders or prospective contractors*—(1) *Certification of compliance with Part 60-2: Affirmative Action Programs.* Each agency shall require each bidder or prospective prime contractor and proposed subcontractor, where appropriate, to state in the bid or in writing at the outset of negotiations for the contract: (i) Whether it has developed and has on file at each establishment affirmative action programs pursuant to Part 60-2 of this chapter; (ii) whether it has participated in any previous contract or subcontract subject to the equal opportunity clause; (iii) whether it has filed with the Joint Reporting Committee, the Director or the Equal Employment Opportunity Commission all reports due under the applicable filing requirements.

(2) *Additional information.* A bidder or prospective prime contractor or proposed subcontractor shall be required to submit such information as the Director requests prior to the award of the contract or subcontract. When a determination has been made to award the contract or subcontract to a specific contractor, such contractor shall be required, prior to award, or after the award, or both, to furnish such other information as the applicant or the Director requests.

(c) *Use of reports.* Reports filed pursuant to this section shall be used only in connection with the administration of the order, the Civil Rights Act of 1964, or in furtherance of the purposes of the order and said Act.

§ 60-1.8 Segregated facilities.

(a) *General.* In order to comply with his obligations under the equal opportunity clause, a prime contractor or subcontractor must insure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, or national origin cannot result. He may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. His obligation extends further to insuring that his employees are not assigned to perform their services at any location, under his control, where the facilities are segregated. This obligation extends to all contracts containing the equal opportunity clause regardless of the amount of the contract. The term "facilities" as used in this section means waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, washrooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees.

(b) *Certification by prime contractors and subcontractors.* Prior to the award or any nonexempt Government contract of subcontract or federally assisted construction contract or subcontract, each agency or applicant shall require the prospective prime contractor and each prime contractor and subcontractor shall require each subcontractor to submit a certification, in the form approved by the Director, that the prospective prime contractor or subcontractor does not and will not maintain any facilities he provides for

his employees in a segregated manner, or permit his employees to perform their services at any location, under his control, where segregated facilities are maintained; and that he will obtain a similar certification in the form approved by the Director, prior to the award of any nonexempt subcontract.

[43 FR 49240, Oct. 20, 1978; 43 FR 51400, Nov. 3, 1978]

§ 60–1.9 Compliance by labor unions and by recruiting and training agencies.

(a) Whenever compliance with the equal opportunity clause may necessitate a revision of a collective bargaining agreement the labor union or unions which are parties to such an agreement shall be given an adequate opportunity to present their views to the director.

(b) The Director shall use his best efforts, directly and through agencies, contractors, subcontractors, applicants, State and local officials, public and private agencies, and all other available instrumentalities, to cause any labor union, recruiting and training agency or other representative of workers who are or may be engaged in work under contracts and subcontracts to cooperate with, and to comply in the implementation of, the purposes of the order.

(c) In order to effectuate the purposes of paragraph (a) of this section, the Director may hold hearings, public or private, with respect to the practices and policies of any such labor union or recruiting and training agency.

(d) The Director may notify any Federal, State, or local agency of his conclusions and recommendations with respect to any such labor organization or recruiting and training agency which in his judgment has failed to cooperate with himself, agencies, prime contractors, subcontractors, or applicants in carrying out the purposes of the order. The Director also may notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever he has reason to believe that the practices of any such labor organization or agency violates title VII of the Civil Rights Act of 1964 or other provisions of Federal law.

§ 60–1.10 Foreign government practices.

Contractors shall not discriminate on the basis of race, color, religion, sex, or national origin when hiring or making employee assignments for work to be performed in the United States or abroad. Contractors are exempted from this obligation only when hiring persons outside the United States for work to be performed outside the United States (see 41 CFR 60–1.5(a)(3)). Therefore, a contractor hiring workers in the United States for either Federal or nonfederally connected work shall be in violation of Executive Order 11246, as amended, by refusing to employ or assign any person because of race, color, religion, sex, or national origin regardless of the policies of the country where the work is to be performed or for whom the work will be performed. Should any contractor be unable to acquire a visa of entry for any employee or potential employee to a country in which or with which it is doing business, and which refusal it believes is due to the race, color, religion, sex, or national origin of the employee or potential employee, the contractor must immediately notify the Department of State and the Director of such refusal.

§ 60–1.11 Payment or reimbursement of membership fees and other expenses to private clubs.

(a)(1) A contractor which maintains a policy or practice of paying membership fees or other expenses for employee participation in private clubs or organizations shall ensure that the policy or practice is administered without regard to the race, color, religion, sex, or national origin of employees.

(2) Payment or reimbursement by contractors of membership fees and other expenses for participation by their employees in a private club or organization which bars, restricts or limits its membership on the basis of race, color, sex, religion, or national origin constitutes a violation of Executive Order 11246 except where the contractor can provide evidence that

such restrictions or limitations do not abridge the promotional opportunities, status, compensation or other terms and conditions of employment of those of its employees barred from membership because of their race, color, religion, sex, or national origin. OFCCP shall provide the contractor with the opportunity to present evidence in defense of its actions.

(b) The contractor has the responsibility of determining whether the club or organization restricts membership on the basis of race, color, religion, sex, or national origin. The contractor may make separate determinations for different chapters of an organization, and where it does so, may limit any necessary corrective action to the particular chapters which observe discriminatory membership policies and practices.

[46 FR 3896, Jan. 16, 1981]

EFFECTIVE DATE NOTE: At 46 FR 3896, Jan. 16, 1981, § 60-1.11 was added. At 46 FR 18951, Mar. 27, 1981, the effective date was deferred until further notice.

Subpart B—General Enforcement; Compliance Review and Complaint Procedure

§ 60-1.20 Compliance reviews.

(a) The purpose of a compliance review is to determine if the prime contractor or subcontractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to insure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, color, religion, sex, or national origin. It shall consist of a comprehensive analysis and evaluation of each aspect of the aforementioned practices, policies, and conditions resulting therefrom. Where necessary, recommendations for appropriate sanctions shall be made.

(b) Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion. Before the contractor can be found to be in compliance with the order, it must make a specific commitment, in writing, to correct any such deficiencies. The commitment must include the precise action to be taken and dates for completion. The time period allotted shall be no longer than the minimum period necessary to effect such changes. Upon approval of the commitment, the contractor may be considered in compliance, on condition that the commitments are faithfully kept. The contractor shall be notified that making such commitments does not preclude future determinations of noncompliance based on a finding that the commitments are not sufficient to achieve compliance.

(c) [Reserved]

(d) Each agency shall include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should exceed the amount of $1 million or more, the prospective contractor and his known first-tier subcontractors with subcontracts of $1 million or more will be subject to a compliance review before the award of the contract. No such contract shall be awarded unless a preaward compliance review of the prospective contractor and his known first-tier $1 million subcontractors has been conducted within 12 months prior to the award. The awarding agency will notify OFCCP and request appropriate action and findings in accordance with this subsection. OFCCP will provide awarding agencies with written reports of compliance within 30 days following the request. In order to qualify for the award of a contract, a contractor and such first-tier subcontractors must be found to be in compliance pursuant to paragraph (b) of this section, and with Part 60-2 of these regulations.

[43 FR 49240, Oct. 20, 1978; 43 FR 51400, Nov. 3, 1978]

§ 60-1.21 Filing complaints.

Complaints shall be filed within 180 days of the alleged violation unless the time for filing is extended by the Director for good cause shown.

[43 FR 49240, Oct. 20, 1978; 43 FR 51400, Nov. 3, 1978]

§ 60-1.22 Where to file.

Complaints may be filed with the OFCCP, 200 Constitution Avenue, NW., Washington, D.C. 20210, or with any OFCCP regional or area office.

§ 60-1.23 Contents of complaint.

(a) The complaint shall include the name, address, and telephone number of the complainant, the name and address of the contractor or subcontractor committing the alleged discrimination, a description of the acts considered to be discriminatory, and any other pertinent information which will assist in the investigation and resolution of the complaint. The complaint shall be signed by the complainant or his/her authorized representative. Complaints alleging class-type violations which do not identify the alleged discriminatee or discriminatees will be accepted, provided the other requirements of this paragraph are met.

(b) If a complaint contains incomplete information, OFCCP shall seek the needed information from the complainant. In the event such information is not furnished to the Director within 60 days of the date of such request, the case may be closed.

§ 60-1.24 Processing of matters.

(a) *Complaints.* OFCCP may refer appropriate complaints to the Equal Employment Opportunity Commission (EEOC) for processing under Title VII of the Civil Rights Act of 1964, as amended, rather than processing under E.O. 11246 and the regulations in this chapter. Upon referring complaints to the EEOC, OFCCP shall promptly notify complainant(s) and the contractor of such referral.

(b) *Complaint investigations.* In conducting complaint investigations, OFCCP shall, as a minimum, conduct a thorough evaluation of the allegations of the complaint and shall be responsible for developing a complete case record. The case record should contain the name, address, and telephone number of each person interviewed, the interview statements, copies, transcripts, or summaries (where appropriate) of pertinent documents, a reference to at least one covered contract, and a narrative report of the investigation with references to exhibits and other evidence which relate to the alleged violations.

(c)(1) [Reserved]

(2) If any complaint investigation or compliance review indicates a violation of the equal opportunity clause, the matter should be resolved by informal means whenever possible. Such informal means may include the holding of a compliance conference.

(3) Where any complaint investigation or compliance review indicates a violation of the equal opportunity clause and the matter has not been resolved by informal means, the Director shall proceed in accordance with § 60-1.26.

(4) When a prime contractor or subcontractor, without a hearing, shall have complied with the recommendations or orders of the Director and believes such recommendations or orders to be erroneous, he shall, upon filing a request therefor within ten days of such compliance, be afforded an opportunity for a hearing and review of the alleged erroneous action.

(5) For reasonable cause shown, the Director may reconsider or cause to be reconsidered any matter on his/her own motion or pursuant to a request.

(d) *Reports to the Director.* (1) With the exception of complaints which have been referred to EEOC, within 60 days from receipt of a complaint or within such additional time as may be allowed by the Director for good cause shown, the complaint shall be processed and the case record developed containing the following information:

(i) Name and address of the complainant;

(ii) Brief summary of findings, including a statement regarding the contractor's compliance or noncompliance with the requirements of the equal opportunity clause;

(iii) A statement of the disposition of the case, including any corrective action taken and any sanctions or penalties imposed or, whenever appropriate, the recommended corrective action and sanctions or penalties.

(2) A written report of every preaward compliance review required by this regulation or otherwise required by the Director, shall be developed and maintained.

(3) A written report of every other compliance review or any other matter processed involving an apparent violation of the equal opportunity clause shall be made. Such report shall contain a brief summary of the findings, including a statement of conclusions regarding the contractor's compliance or noncompliance with the requirements of the order, and a statement of the disposition of the case, including any corrective action taken or recommended and any sanctions or penalties imposed or recommended.

§ 60-1.25 Assumption of jurisdiction by or referrals to the Director.

The Director may inquire into the status of any matter pending before an agency. Where he considers it necessary or appropriate to the achievement of the purposes of the order, he may assume jurisdiction over the matter and proceed as provided herein. Whenever the Director assumes jurisdiction over any matter, or an agency refers any matter he may conduct, or have conducted, such investigations, hold such hearings, make such findings, issue such recommendations and directives, order such sanctions and penalties, and take such other action as may be necessary or appropriate to achieve the purposes of the order. The Director shall promptly notify the agency of any corrective action to be taken or any sanctions to be taken or any sanction to be imposed by the agency. The agency shall take such action, and report the results thereof to the Director within the time specified.

§ 60-1.26 Enforcement proceedings.

(a) *General.* (1) Violations of the Order, equal opportunity clause, the regulations in this chapter, or of applicable construction industry equal employment opportunity requirements, may result in the institution of administrative or judicial enforcement proceedings to enforce the Order and to seek appropriate relief. Violations may be found based upon, inter alia, any of the following: (i) The results of a complaint investigation; (ii) analysis of an affirmative action program; (iii) the results of an on-site review of the contractor's compliance with the Order and its implementing regulations; (iv) a contractor's refusal to submit an affirmative action program; (v) a contractor's refusal to allow an on-site compliance review to be conducted; (vi) a contractor's refusal to supply records or other information as required by these regulations or applicable construction industry requirements; or (vii) any substantial or material violation or the threat of a substantial or material violation of the contractual provisions of the Order, or of the rules or regulations issued pursuant thereto.

(2) If the investigation of a complaint, or a compliance review, results in a determination that the Order, equal opportunity clause or regulations issued pursuant thereto, have been violated, and the violations have not been corrected in accordance with the conciliation procedures in this chapter, OFCCP may institute an administrative enforcement proceeding to enjoin the violations, to seek appropriate relief (which may include affected class and back pay relief), and to impose appropriate sanctions, or any of the above. However, if the contractor refuses to submit an affirmative action program, or refuses to supply records or other requested information, or refuses to allow the compliance agency access to its premises for an on-site review; and if conciliation efforts under this chapter are unsuccessful, OFCCP, notwithstanding the requirements of this chapter, may go directly to administrative enforcement proceedings to enjoin the violations, to seek appropriate relief, and to impose appropriate sanctions, or any of the above. Whenever the Director has reason to believe that there is substantial or material violation or the threat of substantial or material violation of the contractual provisions of the Order or of the rules, regulations or orders issued pursuant thereto, he/she may refer the matter to the Solicitor of Labor to institute administrative enforcement proceedings as set forth in this section or refer the matter to the Department of Justice to enforce the contractual provisions of the Order, to seek injunctive relief (including relief against noncontractors, including labor unions, who seek to thwart implementation of the

Order and regulations) and to seek such additional relief, including back pay, as may be appropriate. There are no procedural prerequisites to a referral to the Department of Justice by the Director, and such referrals may be accomplished without proceeding through the conciliation procedures in this chapter, and a referral may be made at any stage in the procedures under this chapter: *Provided*, That no order for debarment from further contracts or subcontracts pursuant to section 209(a)(6) of the Order shall be made without affording the contractor an opportunity for a hearing, either administrative or judicial.

(b) [Reserved]

(c) *Administrative enforcement proceedings.* Administrative enforcement proceedings shall be conducted under the control and supervision of the Solicitor of Labor and under the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in Part 60-30 of this chapter.

(d) *Decision following administrative proceeding.* If it is determined after a hearing (or after the contractor waives a hearing) that the contractor is violating the Order or the regulations issued thereunder, the Secretary (in accordance with 41 CFR 60-30.30(a)) shall issue an Administrative Order enjoining the violations and requiring the contractor to provide whatever remedies are appropriate, and imposing whatever sanctions are appropriate, or any of the above. In any event, failure to comply with the Administrative Order shall result in the imposition of the sanctions contained in section 209 (a)(5) or (a)(6) of the Executive Order.

(e) *Referrals to the Department of Justice.* (1) Whenever a matter has been referred to the Department of Justice for consideration of judicial proceedings pursuant to § 60-1.26(a)(2) of these regulations, the Attorney General may bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional equitable relief, including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order, or any of the above.

(2) The Attorney General is authorized to conduct such investigation of the facts as he may deem necessary or appropriate to carry out his responsibilities under these regulations.

(3) Prior to the institution of any judicial proceedings, the Attorney General, on behalf of the Director, is authorized to make reasonable efforts to secure compliance with the contract provisions of the Order. He may do so by providing the contractor and any other respondent with reasonable notice of his findings, his intent to file suit, and the actions he believes necessary to obtain compliance with the contract provisions of the Order without contested litigation, and by offering the contractor and any other respondent a reasonable opportunity for conference and conciliation, in an effort to obtain such compliance without contested litigation.

(4) As defined in these regulations, the Attorney General shall mean the Attorney General, the Assistant Attorney General for Civil Rights, or any other person authorized by regulations or practice to act for the Attorney General with respect to the enforcement of equal employment opportunity laws, orders and regulations generally, or in a particular matter or case.

(5) The Director or his/her designee, and representatives of the Attorney General may consult from time to time to determine what investigations should be conducted to determine whether contractors or groups of contractors or other persons may be engaged in patterns or practices in violation of the Executive Order or these regulations, or of resistance to or interference with the full enjoyment of any of the rights secured by them, warranting judicial proceedings.

(f) *Initiation of lawsuits by the Attorney General without referral from the Director.* In addition to initiating lawsuits upon referral under 41 CFR 60-1.26, the Attorney General may, subject to approval by the Director, initiate independent investigations of contractors which he/she has reason to believe may be in violation of the Order or the rules and regulations

issued pursuant thereto. If, upon completion of such an investigation, the Attorney General determines that the contractor has in fact violated the Order or the rules and regulations issued thereunder, he shall make reasonable efforts to secure compliance with the contract provisions of the Order. He may do so by providing the contractor and any other respondent with reasonable notice of the Department's findings, its intent to file suit, and the actions that the Attorney General believes are necessary to obtain compliance with the contract provisions of the Order without contested litigation, and by offering the contractor and any other respondent a reasonable opportunity for conference and conciliation in an effort to obtain such compliance without contested litigation. If these efforts are unsuccessful, the Attorney General may, upon approval by the Director, bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional equitable relief, including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order or any of the above.

(g) To the extent applicable, this section and Part 60-30 of this chapter shall govern proceedings resulting from the Director's determination under § 60-2.2(b) that there are substantial issues of law or fact as to the contractor/bidder's responsibility.

(E.O. 11246 (30 FR 12319) as amended by E.O. 11375 and 12086; sec. 503, Pub. L. 93-112, 87 Stat. 393 (29 U.S.C. 793), as amended by sec. 111, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706) and Executive Order 11758; sec. 503(a), Pub. L. 92-540, 86 Stat. 1097 (38 U.S.C. 2012), as amended by sec. 402, Pub. L. 93-508, 88 Stat. 1593 (38 U.S.C. 2012))

[43 FR 49240, Oct. 20, 1978, as amended at 45 FR 9272, Feb. 12, 1980]

§ 60-1.27 Sanctions and penalties.

The sanctions described in subsections (1), (5), and (6) of section 209(a) of the order may be exercised only by or with the approval of the Director. Referral of any matter arising under the order to the Department of Justice or to the Equal Employment Opportunity Commission shall be made by the Director.

§ 60-1.28 Show cause notices.

When the director has reasonable cause to believe that a contractor has violated the equal opportunity clause he may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted.

§ 60-1.29 Preaward notices.

(a) *Preaward compliance reviews.* Upon the request of the Director, agencies shall not enter into contracts or approve the entry into contracts or subcontracts with any bidder, prospective prime contractor, or proposed subcontractor named by the Director until a preaward compliance review has been conducted and the Director or his designee has approved a determination that the bidder, prospective prime contractor or proposed subcontractor will be able to comply with the provisions of the equal opportunity clause.

(b) *Other special preaward procedures.* Upon the request of the Director, agencies shall not enter into contracts or approve the entry into subcontracts with any bidder; prospective prime contractor or proposed subcontractor specified by the Director until the agency has complied with the directions contained in the request.

§ 60-1.30 Contract ineligibility list.

The Director shall distribute periodically a list to all executive departments and agencies giving the names of prime contractors and subcontractors who have been declared ineligible under the regulations in this part and the order.

§ 60-1.31 Reinstatement of ineligible prime contractors and subcontractors.

Any prime contractor or subcontractor declared ineligible for further contracts or subcontracts under the order may request reinstatement in a letter directed to the Director. In connection with the reinstatement proceedings, the prime contractor or subcontractor

shall be required to show that it has established and will carry out employment policies and practices in compliance with the equal opportunity clause.

§ 60-1.32 Intimidation and interference.

The sanctions and penalties contained in Subpart D of the order may be exercised by the Director against any prime contractor, subcontractor or applicant who fails to take all necessary steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in an investigation, compliance review, hearing, or any other activity related to the administration of the order or any other Federal, State, or local laws requiring equal employment opportunity.

§ 60-1.33 Conciliation agreements.

(a) If a compliance review, complaint investigation or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and (1) if the contractor, subcontractor or bidder is willing to correct the violations and/or deficiencies, and (2) if OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to), remedies such as back pay and retroactive seniority.

(b) The term "conciliation agreement" does not include "letters of commitment" which are appropriate for resolving minor technical deficiencies.

(E.O. 11246 (30 FR 12319) as amended by E.O. 11375 and 12086)

[44 FR 77002, Dec. 28, 1979]

§ 60-1.34 Violation of a conciliation agreement or letter of commitment.

(a) When a conciliation agreement has been violated, the following procedures are applicable:

(1) A written notice shall be sent to the contractor setting forth the violations alleged and summarizing the supporting evidence. The contractor shall have 15 days from receipt of the notice to respond, except in those cases in which such a delay would result in irreparable injury to the employment rights of affected employees or applicants.

(2) During the 15-day period the contractor may demonstrate in writing that it has not violated its commitments.

(3) If the contractor is unable to demonstrate that it has not violated its commitments, or if the complaint alleges irreparable injury, enforcement proceedings may be intitiated immediately without issuing a show cause notice or proceeding through any other requirement contained in this chapter.

(b) If the contractor has violated a letter of commitment, the matter shall be handled, where appropriate, pursuant to 41 CFR 60-2.2(c) or 60-4.8. The violation may be corrected through a conciliation agreement, or an enforcement proceeding may be initiated.

(E.O. 11246 (30 FR 12319) as amended by EO 11375 and 12086)

[44 FR 77002, Dec. 28, 1979]

Subpart C—Ancillary Matters

§ 60-1.40 Affirmative action compliance programs.

(a) *Requirements of programs.* Each contractor who has 50 or more employees and (1) has a contract of $50,000 or more; or (2) has Government bills of lading which in any 12-month period, total or can reasonably be expected to total $50,000 or more; or (3) serves as a depository of Government funds in any amount; or (4) is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, shall develop a written affirmitive action compliance program for

each of it's establishments. Each contractor and subcontractor shall require each subcontractor who has 50 or more employees and (i) has a subcontract of $50,000 or more; or (ii) has Government bills of lading which in any 12-month period, total or can reasonably be expected to total $50,000 or more; or (iii) serves as a depository of Government funds in any amount; or (iv) is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, to develop a written affirmative action compliance program for each of its establishments. A necessary prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority employment and an evaluation of opportunities for utilization of minority group personnel. The contractor's program shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups, including, when there are deficiencies, the development of specific goals and time tables for the prompt achievement of full and equal employment opportunity. Each contractor shall include in its affirmative action compliance program a table of job classifications. This table should include but need not be limited to job titles, principal duties (and auxiliary duties, if any), rates of pay, and where more than one rate of pay applied (because of length of time in the job or other factors), the applicable rates. The affirmative action compliance program shall be signed by an executive official of the contractor.

(b) *Utilization evaluation.* The evaluation of utilization of minority group personnel shall include the following:

(1) An analysis of minority group representation in all job categories.

(2) An analysis of hiring practices for the past year, including recruitment sources and testing, to determine whether equal employment opportunity is being afforded in all job categories.

(3) An analysis of upgrading, transfer and promotion for the past year to determine whether equal employment opportunity is being afforded.

(c) *Maintenance of programs.* Within 120 days from the commencement of the contract, each contractor shall maintain a copy of separate affirmative action compliance programs for each establishment, including evaluations of utilization of minority group personnel and the job classification tables, at each local office responsible for the personnel matters of such establishment. An affirmative action compliance program shall be part of the manpower and training plans for each new establishment and shall be developed and made available prior to the staffing of such establishment. A report of the results of such program shall be compiled annually and the program shall be updated at that time. This information shall be made available to representatives of the Director upon request and the contractor's affirmative action program and the result it produces shall be evaluated as part of compliance review activities.

[43 FR 49240, Oct. 20, 1978; 43 FR 51400, Nov. 3, 1978]

§ 60-1.41 Solicitations or advertisements for employees.

In solicitations or advertisements for employees placed by or on behalf of a prime contractor or subcontractor, the requirements of paragraph (2) of the equal opportunity clause shall be satisfied whenever the prime contractor or subcontractor complies with any of the following:

(a) States expressly in the solicitations or advertising that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin;

(b) Uses display or other advertising, and the advertising includes an appropriate insignia prescribed by the Director. The use of the insignia is considered subject to the provisions of 18 U.S.C. 701;

(c) Uses a single advertisement, and the advertisement is grouped with other advertisements under a caption which clearly states that all employers in the group assure all qualified applicants equal consideration for employment without regard to race, color, religion, sex, or national origin;

(d) Uses a single advertisement in which appears in clearly distinguishable type the phrase "an equal opportunity employer."

§ 60-1.42 Notices to be posted.

(a) Unless alternative notices are prescribed by the Director, the notices which prime contractors and subcontractors are required to post by paragraphs (1) and (3) of the equal opportunity clause will contain the following language and will be provided by the contracting or administering agencies:

EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW—DISCRIMINATION IS PROHIBITED BY THE CIVIL RIGHTS ACT OF 1964 AND BY EXECUTIVE ORDER NO. 11246

Title VII of the Civil Rights Act of 1964—*Administered by:*

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin by Employers with 75 or more employees, by Labor Organizations with a hiring hall of 75 or more members, by Employment Agencies, and by Joint Labor-Management Committees for Apprenticeship or Training. After July 1, 1967, employers and labor organizations with 50 or more employees or members will be covered; after July 1, 1968, those with 25 or more will be covered.

ANY PERSON

Who believes he or she has been discriminated against

SHOULD CONTACT

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

2401 E Street NW, Washington, D.C. 20506

Executive Order No. 11246—*Administered by:*

THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin, and requires affirmative action to ensure equality of opportunity in all aspects of employment.

By all Federal Government Contractors and Subcontractors, and by Contractors Performing Work Under a Federal Assisted Construction Contract, regardless of the number of employees in either case.

ANY PERSON

Who believes he or she has been discriminated against

SHOULD CONTACT

THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

U.S. Department of Labor Washington, D.C. 20210

(b) The requirements of paragraph (3) of the equal opportunity clause will be satisfied whenever the prime contractor or subcontractor posts copies of the notification prescribed by or pursuant to paragraph (a) of this section in conspicuous places available to employees, applicants for employment, and representatives of each labor union or other organization representing his employees with which he has a collective-bargaining agreement or other contract or understanding.

§ 60-1.43 Access to records and site of employment.

Each prime contractor and subcontractor shall permit access during normal business hours to its premises for the purpose of conducting on-site compliance reviews and inspecting and copying such books, records, accounts, and other material as may be relevant to the matter under investigation and pertinent to compliance with the Order, and the rules and regulations promulgated pursuant thereto by the agency, or the Director. Information obtained in this manner shall be used only in connection with the administration of the Order, the administration of the Civil Rights Act of 1964 (as amended) and in furtherance of the purposes of the Order and that Act. (See 41 CFR Part 60-60, Contractor Evaluation Procedures for Nonconstruction Contractors; 41 CFR Part 60-40, Examination and Copying of OFCCP Documents.)

(Sec. 201. E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303)

§ 60-1.44 Rulings and interpretations.

Rulings under or interpretations of the order or the regulations contained in this part shall be made by the Secretary or his designee.

§ 60-1.45 Existing contracts and subcontracts.

All contracts and subcontracts in effect prior to October 24, 1965, which are not subsequently modified shall be administered in accordance with the nondiscrimination provisions of any prior applicable Executive orders. Any contract or subcontract modified on or after October 24, 1965, shall be subject to Executive Order 11246. Complaints received by and violations coming to the attention of agencies regarding contracts and subcontracts which were subject to Executive Orders 10925 and 11114 shall be processed as if they were complaints regarding violations of this order.

§ 60-1.46 Delegation of authority by the Director.

The Director is authorized to redelegate the authority given to him by the regulations in this part. The authority redelegated by the Director pursuant to the regulations in this part shall be exercised under his general direction and control.

§ 60-1.47 Effective date.

The regulations contained in this part shall become effective July 1, 1968, for all contracts, the solicitations, invitations for bids, or requests for proposals which were sent by the Government or an applicant on or after said effective date, and for all negotiated contracts which have not been executed as of said effective date. Notwithstanding the foregoing, the regulations in this part shall become effective as to all contracts executed on and after the 120th day following said effective date. Subject to any prior approval of the Secretary, any agency may defer the effective date of the regulations in this part, for such period of time as the Secretary finds to be reasonably necessary. Contracts executed prior to the effective date of the regulations in this part shall be governed by the regulations promulgated by the former President's Committee on Equal Employment Opportunity which appear at 28 FR 9812, September 2, 1963, and at 28 FR 11305, October 23, 1963, the temporary regulations which appear at 30 FR 13441, October 22, 1965, and the orders at 31 FR 6881, May 10, 1966, and 32 FR 7439, May 19, 1967.

PART 60-2—AFFIRMATIVE ACTION PROGRAMS

Subpart A—General

Sec.
60-2.1 Title, purpose and scope.
60-2.2 Agency action.

Subpart B—Required Contents of Affirmative Action Programs

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60-2.11 Required utilization analysis.
60-2.12 Establishment of goals and timetables.
60-2.13 Additional required ingredients of affirmative action programs.
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60-2.15 Compliance status.

Subpart C—Methods of Implementing the Requirements of Subpart B

60-2.20 Development or reaffirmation of the equal employment opportunity policy.
60-2.21 Dissemination of the policy.
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Subpart D—Miscellaneous

60-2.30 Use of goals.
60-2.31 Preemption.
60-2.32 Supersedure.

AUTHORITY: 5 U.S.C. 553(a)(3)(B); 29 CFR 2.7; sec. 201, E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303, as amended by E.O. 12086.

SOURCE: 43 FR 49249, Oct. 20, 1978, unless otherwise noted.

OMB CONTROL No.: 1215-0072. (47 FR 14696, Apr. 6, 1982)

90-144 O—82——31

Subpart A—General

§ 60-2.1 Title, purpose and scope.

(a) This part shall also be known as "Revised Order No. 4," and shall cover nonconstruction contractors. Section 60-1.40 of this chapter, affirmative action compliance programs, requires that within 120 days from the commencement of a contract each prime contractor or subcontractor with 50 or more employees and (1) a contract of $50,000 or more; or (2) Government bills of lading which, in any 12-month period, total or can reasonably be expected to total $50,000 or more; or (3) who serves as a depository of Government funds in any amount; or (4) who is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, develop a written affirmative action compliance program for each of its establishments. A review of compliance surveys indicates that many contractors do not have affirmative action programs on file at the time an establishment is visited by a compliance investigator. This part details the review procedure and the results of a contractor's failure to develop and maintain an affirmative action program and then sets forth detailed guidelines to be used by contractors and the Government in developing and judging these programs as well as the good faith effort required to transform the programs from paper commitments to equal employment opportunity. Subparts B and C of this part are concerned with affirmative action plans only.

(b) Relief, including back pay where appropriate, for members of an affected class who by virtue of past discrimination continue to suffer the present effects of that discrimination, shall be provided in the conciliation agreement entered into pursuant to § 60-60.6 of this title. An "affected class" problem must be remedied in order for a contractor to be considered in compliance. Section 60-2.2 herein pertaining to an acceptable affirmative action program is also applicable to the failure to remedy discrimination against members of an "affected class."

§ 60-2.2 Agency action.

(a) Any contractor required by § 60-1.40 of this chapter to develop an affirmative action program at each of its establishments who has not complied fully with that section is not in compliance with Executive Order 11246, as amended (30 FR 12319). Until such programs are developed and found to be acceptable in accordance with the standards and guidelines set forth in §§ 60-2.10 through 60-2.32, the contractor is unable to comply with the equal employment opportunity clause. An affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate OFCCP field, area, regional, or national office has accepted such plan unless within 45 days thereafter the Director has disapproved such plan.

(b) If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his agency or through the Office of Federal Contract Compliance Programs or other Government agencies, that the contractor has no affirmative action program at each of its establishments, or has substantially deviated from such an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the regulations in this chapter, the contracting officer shall declare the contractor/bidder nonresponsible and so notify the contractor and the Director, unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations. Any contractor/bidder which has been declared nonresponsible in accordance with the provisions of this section may request the Director to determine that the responsibility of the contractor/bidder raises substantial issues of law or fact to the extent that a hearing is required. Such request shall set forth the basis upon which the contractor/bidder seeks such a determination. If the Director, in his/her sole discretion, determines that substantial issues of law or fact exist, an administrative or judicial proceeding may be commenced in accordance with the regulations contained in

§ 60-1.26; or the Director may require the investigation or compliance review be developed further or additional conciliation be conducted: *Provided*, That during any pre-award conferences, every effort shall be made through the processes of conciliation, mediation, and persuasion to develop an acceptable affirmative action program meeting the standards and guidelines set forth in §§ 60-2.10 through 60-2.32 so that, in the performance of his contract, the contractor is able to meet its equal employment obligations in accordance with the equal opportunity clause and applicable rules, regulations, and orders: *Provided further*, That a contractor/bidder may not be declared nonresponsible more than twice due to past noncompliance with the equal opportunity clause at a particular establishment or facility without receiving prior notice and an opportunity for a hearing.

(c)(1) Immediately upon finding that a contractor has no affirmative action program, or has deviated substantially from an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the requirements of the regulations in this chapter, that fact shall be recorded in the investigation file. Whenever administrative enforcement is contemplated, the notice to the contractor shall be issued giving him 30 days to show cause why enforcement proceedings under section 209(a) of Executive Order 11246, as amended, should not be instituted. The notice to show cause should contain:

(i) An itemization of the sections of the Executive Order and of the regulations with which the contractor has been found in apparent violation, and a summary of the conditions, practices, facts, or circumstances which give rise to each apparent violation;

(ii) The corrective actions necessary to achieve compliance or, as may be appropriate, the concepts and principles of an acceptable remedy and/or the corrective action results anticipated;

(iii) A request for a written response to the findings, including commitments to corrective action or the presentation of opposing facts and evidence; and

(iv) A suggested date for the conciliation conference.

(2) If the contractor fails to show good cause for his failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program within 30 days, the case file shall be processed for enforcement proceedings pursuant to § 60-1.26 of this chapter. If an administrative complaint is filed, the contractor shall have 20 days to request a hearing. If a request for hearing has not been received within 20 days from the filing of the administrative complaint, the matter shall proceed in accordance with Part 60-30 of this chapter.

(3) During the "show cause" period of 30 days, every effort will be made through conciliation, mediation, and persuasion to resolve the deficiencies which led to the determination of nonresponsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the case shall be processed for enforcement proceedings pursuant to § 60-1.26 of this chapter.

(d) During the "show cause" period and formal proceedings, each contracting agency must continue to determine the contractor's responsibility in considering whether or not to award a new or additional contract.

[43 FR 49249, Oct. 20, 1978; 43 FR 51400, Nov. 3, 1978]

Subpart B—Required Contents of Affirmative Action Programs

§ 60-2.10 Purpose of affirmative action program.

An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable affirmative action program must include an analysis of areas within which the contractor is defi-

cient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of its work force where deficiencies exist.

[43 FR 49249, Oct. 20, 1978; 43 FR 51400, Nov. 3, 1978]

§ 60-2.11 Required utilization analysis.

Based upon the Government's experience with compliance reviews under the Executive Order program and the contractor reporting system, minority groups are most likely to be underutilized in departments and jobs within departments that fall within the following Employer's Information Report (EEO-1) designations: Officials and managers, professionals, technicians, sales workers, office and clerical and craftsmen (skilled). As categorized by the EEO-1 designations, women are likely to be underutilized in departments and jobs within departments as follows: Officials and managers, professionals, technicians, sales workers (except over-the-counter sales in certain retail establishments), craftsmen (skilled and semi-skilled). Therefore, the contractor shall direct special attention to such jobs in its analysis and goal setting for minorities and women. Affirmative action programs must contain the following information:

(a) Workforce analysis which is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges. For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed.

(b) An analysis of all major job groups at the facility, with explanation if minorities or women are currently being underutilized in any one or more job groups ("job groups" herein meaning one or a group of jobs having similar content, wage rates and opportunities). "Underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. In making the utilization analysis, the contractor shall conduct such analysis separately for minorities and women.

(1) In determining whether minorities are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The minority population of the labor area surrounding the facility;

(ii) The size of the minority unemployment force in the labor area surrounding the facility;

(iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;

(iv) The general availability of minorities having requisite skills in the immediate labor area;

(v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

(2) In determining whether women are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The size of the female unemployment force in the labor area surrounding the facility;

(ii) The percentage of the female workforce as compared with the total workforce in the immediate labor area;

(iii) The general availability of women having requisite skills in the immediate labor area;

(iv) The availability of women having requisite skills in an area in which the contractor can reasonably recruit;

(v) The availability of women seeking employment in the labor or recruitment area of the contractor;

(vi) The availability of promotable and transferable female employees within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to women.

[43 FR 49249, Oct. 20, 1978; 43 FR 51400, Nov. 3, 1978]

§ 60-2.12 Establishment of goals and timetables.

(a) The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of its deficiencies and its entire affirmative action program. Thus, in establishing the size of its goals and the length of its timetables, the contractor should consider the results which could reasonably be expected from its putting forth every good faith effort to make its overall affirmative action program work. In determining levels of goals, the contractor should consider at least the factors listed in § 60-2.11.

(b) Involve personnel relations staff, department and division heads, and local and unit managers in the goal-setting process.

(c) Goals should be significant, measurable, and attainable.

(d) Goals should be specific for planned results, with timetables for completion.

(e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.

(f) In establishing timetables to meet goals and commitments, the contractor will consider the anticipated expansion, contraction, and turnover of and in the work force.

(g) Goals, timetables, and affirmative action commitments must be designed to correct any identifiable deficiencies.

(h) Where deficiencies exist and where numbers or percentages are relevant in developing corrective action, the contractor shall establish and set forth specific goals and timetables separately for minorities and women.

(i) Such goals and timetables, with supporting data and the analysis thereof shall be a part of the contractor's written affirmative action program and shall be maintained at each establishment of the contractor.

(j) A contractor or subcontractor extending a publicly announced preference for Indians as authorized in 41 CFR 60-1.5(a)(6) may reflect in its goals and timetables the permissive employment preference for Indians living on or near an Indian reservation.

(k) Where the contractor has not established a goal, its written affirmative action program must specifically analyze each of the factors listed in § 60-2.11 and must detail its reason for a lack of a goal.

(l) In the event it comes to the attention of the Office of Federal Contract Compliance Programs that there is a substantial disparity in the utilization of a particular minority group or men or women of a particular minority group, OFCCP may require separate goals and timetables for such minority group and may further require, where appropriate, such goals and timetables by sex for such group for such job classifications and organizational units specified by the OFCCP.

(m) Support data for the required analysis and program shall be compiled and maintained as part of the contractor's affirmative action program. This data will include but not be

limited to progression line charts, seniority rosters, applicant flow data, and applicant rejection ratios indicating minority and sex status.

(n) Copies of affirmative action programs and/or copies of support data shall be made available to the Office of Federal Contract Compliance Programs, upon request, for such purposes as may be appropriate to the fulfillment of its responsibilities under Executive Order 11246, as amended.

[43 FR 49249, Oct. 20, 1978; 43 FR 51400, Nov. 3, 1978]

§ 60-2.13 Additional required ingredients of affirmative action programs.

Effective affirmative action programs shall contain, but not necessarily be limited to, the following ingredients:

(a) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions.

(b) Formal internal and external dissemination of the contractor's policy.

(c) Establishment of responsibilities for implementation of the contractor's affirmative action program.

(d) Identification of problem areas (deficiencies) by organizational units and job group.

(e) Establishment of goals and objectives by organizational units and job groups, including timetables for completion.

(f) Development and execution of action-oriented programs designed to eliminate problems and further designed to attain established goals and objectives.

(g) Design and implementation of internal audit and reporting systems to measure effectiveness of the total program.

(h) Compliance of personnel policies and practices with the Sex Discrimination Guidelines (41 CFR Part 60-20).

(i) Active support of local and national community action programs and community service programs, designed to improve the employment opportunities of minorities and women.

(j) Consideration of minorities and women not currently in the work force having requisite skills who can be recruited through affirmative action measures.

§ 60-2.14 Program summary.

The affirmative action program shall be summarized and updated annually. The program summary shall be prepared in a format which shall be prescribed by the Director and published in the FEDERAL REGISTER as a notice before becoming effective. Contractors and subcontractors shall submit the program summary to OFCCP each year on the anniversary date of the affirmative action program.

[44 FR 77003, Dec. 28, 1979]

§ 60-2.15 Compliance status.

No contractor's compliance status shall be judged alone by whether or not it reaches its goals and meets its timetables. Rather, each contractor's compliance posture shall be reviewed and determined by reviewing the contents of its program, the extent of its adherence to this program, and its good faith efforts to make its program work toward the realization of the program's goals within the timetables set for completion. There follows an outline of examples of procedures that contractors and Federal agencies should use as a guideline for establishing, implementing, and judging an acceptable affirmative action program.

[43 FR 49249, Oct. 20, 1978; 43 FR 51400, Nov. 3, 1978. Redesignated at 44 FR 77003, Dec. 28, 1979]

Subpart C—Methods of Implementing the Requirements of Subpart B

§ 60-2.20 Development or reaffirmation of the equal employment opportunity policy.

(a) The contractor's policy statement should indicate the chief executive officer's attitude on the subject matter, assign overall responsibility and provide for a reporting and monitoring procedure. Specific items to be mentioned should include, but not be limited to:

(1) Recruit, hire, train, and promote persons in all job titles, without regard to race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification. (The term "bona fide occupational qualification"

has been construed very narrowly under the Civil Rights Act of 1964. Under Executive Order 11246 as amended and this part, this term will be construed in the same manner.)

(2) Base decisions on employment so as to further the principle of equal employment opportunity.

(3) Insure that promotion decisions are in accord with principles of equal employment opportunity by imposing only valid requirements for promotional opportunities.

(4) Insure that all personnel actions such as compensation, benefits, transfers, layoffs, return from layoff, company sponsored training, education, tuition assistance, social and recreation programs, will be administered without regard to race, color, religion, sex, or national origin.

[43 FR 49249, Oct. 30, 1978; 43 FR 51400, Nov. 3, 1978]

§ 60-2.21 Dissemination of the policy.

(a) The contractor should disseminate its policy internally as follows:

(1) Include it in contractor's policy manual.

(2) Publicize it in company newspaper, magazine, annual report, and other media.

(3) Conduct special meetings with executive, management, and supervisory personnel to explain intent of policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude.

(4) Schedule special meetings with all other employees to discuss policy and explain individual employee responsibilities.

(5) Discuss the policy thoroughly in both employee orientation and management training programs.

(6) Meet with union officials to inform them of policy, and request their cooperation.

(7) Include nondiscrimination clauses in all union agreements, and review all contractual provisions to insure they are nondiscriminatory.

(8) Publish articles covering EEO programs, progress reports, promotions, etc., of minority and female employees, in company publications.

(9) Post the policy on company bulletin boards.

(10) When employees are featured in product or consumer advertising, employee handbooks or similar publications both minority and nonminority, men and women should be pictured.

(11) Communicate to employees the existence of the contractor's affirmative action program and make available such elements of its program as will enable such employees to know of and avail themselves of its benefits.

(b) The contractor should disseminate its policy externally as follows:

(1) Inform all recruiting sources verbally and in writing of company policy, stipulating that these sources actively recruit and refer minorities and women for all positions listed.

(2) Incorporate the equal opportunity clause in all purchase orders, leases, contracts, etc., covered by Executive Order 11246, as amended, and its implementing regulations.

(3) Notify minority and women's organizations, community agencies, community leaders, secondary schools, and colleges, of company policy, preferably in writing.

(4) Communicate to prospective employees the existence of the contractor's affirmative action program and make available such elements of its program as will enable such prospective employees to know of and avail themselves of its benefits.

(5) When employees are pictured in consumer or help wanted advertising, both minorities and nonminority men and women should be shown.

(6) Send written notification of company policy to all subcontractors, vendors, and suppliers requesting appropriate action on their part.

[43 FR 49249, Oct. 30, 1978; 43 FR 51400, Nov. 3, 1978]

§ 60-2.22 Responsibility for implementation.

(a) An executive of the contractor should be appointed as director or manager of company equal opportunity programs. Depending upon the size and geographical alignment of the company, this may be his or her sole responsibility. He or she should be given the necessary top management support and staffing to execute the assignment. His or her identity should

appear on all internal and external communications on the company's equal opportunity programs. His or her responsibilities should include, but not necessarily be limited to:

(1) Developing policy statements, affirmative action programs, internal and external communication techniques.

(2) Assisting in the identification of problem areas.

(3) Assisting line management in arriving at solutions to problems.

(4) Designing and implementing audit and reporting systems that will:

(i) Measure effectiveness of the contractor's programs.

(ii) Indicate need for remedial action.

(iii) Determine the degree to which the contractor's goals and objectives have been attained.

(5) Serve as liaison between the contractor and enforcement agencies.

(6) Serve as liaison between the contractor and minority organizations, women's organizations and community action groups concerned with employment opportunities of minorities and women.

(7) Keep management informed of latest developments in the entire equal opportunity area.

(b) Line responsibilities should include, but not be limited to the following:

(1) Assistance in the identification of problem areas and establishment of local and unit goals and objectives.

(2) Active involvement with local minority organizations, women's organizations, community action groups and community service programs.

(3) Periodic audit of training programs, hiring and promotion patterns to remove impediments to the attainment of goals and objectives.

(4) Regular discussions with local managers, supervisors, and employees to be certain the contractor's policies are being followed.

(5) Review of the qualifications of all employees to insure that minorities and women are given full opportunities for transfers and promotions.

(6) Career counseling for all employees.

(7) Periodic audit to insure that each location is in compliance in areas such as:

(i) Posters are properly displayed.

(ii) All facilities, including company housing, which the contractor maintains for the use and benefit of its employees, are in fact desegregated, both in policy and use. If the contractor provides facilities such as dormitories, locker rooms and rest rooms, they must be comparable for both sexes.

(iii) Minority and female employees are afforded a full opportunity and are encouraged to participate in all company sponsored educational, training, recreational, and social activities.

(8) Supervisors should be made to understand that their work performance is being evaluated on the basis of their equal employment opportunity efforts and results, as well as other criteria.

(9) It shall be a responsibility of supervisors to take actions to prevent harassment of employees placed through affirmative action efforts.

[43 FR 49249, Oct. 30, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-2.23 Identification of problem areas by organizational units and job groups.

(a) An in-depth analysis of the following should be made, paying particular attention to trainees and those categories listed in § 60-2.11(b).

(1) Composition of the work force by minority group status and sex.

(2) Composition of applicant flow by minority group status and sex.

(3) The total selection process including position descriptions, position titles, worker specifications, application forms, interview procedures, test administration, test validity, referral procedures, final selection process, and similar factors.

(4) Transfer and promotion practices.

(5) Facilities, company sponsored recreation and social events, and special programs such as educational assistance.

(6) Seniority practices and seniority provisions of union contracts.

(7) Apprenticeship programs.

(8) All company training programs, formal and informal.

(9) Work force attitude.

(10) Technical phases of compliance, such as poster and notification to labor unions, retention of applications, notification to subcontractors, etc.

(b) If any of the following items are found in the analysis, special corrective action should be appropriate.

(1) An "underutilization" of minorities or women in specific job groups.

(2) Lateral and/or vertical movement of minority or female employees occurring at a lesser rate (compared to work force mix) than that of nonminority or male employees.

(3) The selection process eliminates a significantly higher percentage of minorities or women than nonminorities or men.

(4) Application and related preemployment forms not in compliance with Federal legislation.

(5) Position descriptions inaccurate in relation to actual functions and duties.

(6) Formal or scored selection procedures not validated as required by the OFCCP Uniform Guidelines on Employee Selection Procedures.

(7) Test forms not validated by location, work performance and inclusion of minorities and women in sample.

(8) Referral ratio of minorities or women to the hiring supervisor or manager indicates a significantly higher percentage are being rejected as compared to nonminority and male applicants.

(9) Minorities or women are excluded from or are not participating in company sponsored activities or programs.

(10) De facto segregation still exists at some facilities.

(11) Seniority provisions contribute to overt or inadvertent discrimination, i.e., a disparity by minority group status or sex exists between length of service and types of job held.

(12) Nonsupport of company policy by managers, supervisors or employees.

(13) Minorities or women underutilized or significantly underrepresented in training or career improvement programs.

(14) No formal techniques established for evaluating effectiveness of EEO programs.

(15) Lack of access to suitable housing inhibits recruitment efforts and employment of qualified minorities.

(16) Lack of suitable transportation (public or private) to the work place inhibits minority employment.

(17) Labor unions and subcontractors not notified of their responsibilities.

(18) Purchase orders do not contain EEO clause.

(19) Posters not on display.

§ 60-2.24 Development and execution of programs.

(a) The contractor should conduct detailed analyses of position descriptions to insure that they accurately reflect position functions, and are consistent for the same position from one location to another.

(b) The contractor should validate worker specifications by division, department, location or other organizational unit and by job title using job performance criteria. Special attention should be given to academic, experience and skill requirements to insure that the requirements in themselves do not constitute inadvertent discrimination. Specifications should be consistent for the same job title in all locations and should be free from bias as regards to race, color, religion, sex or national origin, except were sex is a bona fide occupational qualification. Where requirements screen out a disproportionate number of minorities or women, such requirements should be professionally validated to job performance.

(c) Approved position descriptions and worker specifications, when used by the contractor, should be made available to all members of management involved in the recruiting, screening, selection, and promotion process. Copies should also be distributed to all recruiting sources.

(d) The contractor should evaluate the total selection process to insure freedom from bias and, thus, aid the attainment of goals and objectives.

(1) All personnel involved in the recruiting, screening, selection, promotion, disciplinary, and related processes should be carefully selected and

trained to insure elimination of bias in all personnel actions.

(2) The contractor shall observe the requirements of the OFCCP Uniform Guidelines on Employee Selection Procedures.

(3) Selection techniques other than tests may also be improperly used so as to have the effect of discriminating against minority groups and women. Such techniques include but are not restricted to, unscored interviews, unscored or casual application forms, arrest records, credit checks, considerations of marital status or dependency or minor children. Where there exist data suggesting that such unfair discrimination or exclusion of minorities or women exists, the contractor should analyze his unscored procedures and eliminate them if they are not objectively valid.

(e) Suggested techniques to improve recruitment and increase the flow of minority or female applicants follow:

(1) Certain organizations such as the Urban League, Job Corps, Equal Opportunity Programs, Inc., Concentrated Employment programs, Neighborhood Youth Corps, Secondary Schools, Colleges, and City Colleges with high minority enrollment, the State Employment Service, specialized employment agencies, Aspira, LULAC, SER, the G.I. Forum, the Commonwealth of Puerto Rico are normally prepared to refer minority applicants. Organizations prepared to refer women with specific skills are: National Organization for Women, Welfare Rights organizations, Women's Equity Action League, Talent Bank from Business and Professional Women (including 26 women's organizations), Professional Women's Caucus, Intercollegiate Association of University Women, Negro Women's sororities and service groups such as Delta Sigma Theta, Alpha Kappa Alpha, and Zeta Phi Beta; National Council of Negro Women, American Association of University Women, YWCA, and sectarian groups such as Jewish Women's Groups, Catholic Women's Groups and Protestant Women's Groups, and women's colleges. In addition, community leaders as individuals shall be added to recruiting sources.

(2) Formal briefing sessions should be held, preferably on company premises, with representatives from these recruiting sources. Plant tours, presentations by minority and female employees, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefings. Formal arrangements should be made for referral of applicants, followup with sources, and feedback on disposition of applicants.

(3) Minority and female employees, using procedures similar to subparagraph (2) of this paragraph, should be actively encouraged to refer applicants.

(4) A special effort should be made to include minorities and women on the Personnel Relations staff.

(5) Minority and female employees should be made available for participation in Career Days, Youth Motivation Programs, and related activities in their communities.

(6) Active participation in "Job Fairs" is desirable. Company representative so participating should be given authority to make on-the-spot commitments.

(7) Active recruiting programs should be carried out at secondary schools, junior colleges, and colleges with predominant minority or female enrollments.

(8) Recruiting efforts at all schools should incorporate special efforts to reach minorities and women.

(9) Special employment programs should be undertaken whenever possible. Some possible programs are:

(i) Technical and nontechnical co-op programs with predominately Negro and women's colleges.

(ii) "After school" and/or work-study jobs for minority youths, male and female.

(iii) Summer jobs for underprivileged youth, male and female.

(iv) Summer work-study programs for male and female faculty members of the predominantly minority schools and colleges.

(v) Motivation, training and employment programs for the hardcore unemployed, male and female.

(10) When recruiting brochures pictorially present work situations, the minority and female members of the work force should be included, especially when such brochures are used in school and career programs.

(11) Help wanted advertising should be expanded to include the minority news media and women's interest media on a regular basis.

(f) The contractor should insure that minority and female employees are given equal opportunity for promotion. Suggestions for achieving this result include:

(1) Post or otherwise announce promotional opportunities.

(2) Make an inventory of current minority and female employees to determine academic, skill and experience level of individual employees.

(3) Initiate necessary remedial, job training and workstudy programs.

(4) Develop and implement formal employee evaluation programs.

(5) Make certain "worker specifications" have been validated on job performance related criteria. (Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent.)

(6) When apparently qualified minority or female employees are passed over for upgrading, require supervisory personnel to submit written justification.

(7) Establish formal career counseling programs to include attitude development, education aid, job rotation, buddy system and similar programs.

(8) Review seniority practices and seniority clauses in union contracts to insure such practices or clauses are nondiscriminatory and do not have a discriminatory effect.

(g) Make certain facilities and company-sponsored social and recreation activities are desegregated. Actively encourage all employees to participate.

(h) Encourage child care, housing and transportation programs appropriately designed to improve the employment opportunities for minorities and women.

[43 FR 49249, Oct. 30, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-2.25 Internal audit and reporting systems.

(a) The contractor should monitor records of referrals, placements, transfers, promotions and terminations at all levels to insure nondiscriminatory policy is carried out.

(b) The contractor should require formal reports from unit managers on a schedule basis as to degree to which corporate or unit goals are attained and timetables met.

(c) The contractor should review report results with all levels of management.

(d) The contractor should advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

§ 60-2.26 Support of action programs.

(a) The contractor should appoint key members of management to serve on merit employment councils, community relations boards and similar organizations.

(b) The contractor should encourage minority and female employees to participate actively in National Alliance of Businessmen programs for youth motivation.

(c) The contractor should support vocational guidance institutes, vestibule training programs and similar activities.

(d) The contractor should assist secondary schools and colleges in programs designed to enable minority and female graduates of these institutions to compete in the open employment market on a more equitable basis.

(e) The contractor should publicize achievements of minority and female employees in local and minority news media.

(f) The contractor should support programs developed by such organizations as National Alliance of Businessmen, the Urban Coalition and other organizations concerned with employment opportunities for minorities or women.

[43 FR 49249, Oct. 30, 1978; 43 FR 51401, Nov. 3, 1978]

Subpart D—Miscellaneous

§ 60-2.30 Use of goals.

The purpose of a contractor's establishment and use of goals is to insure that it meet its affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin.

[43 FR 49249, Oct. 30, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-2.31 Preemption.

To the extent that any State or local laws, regulations or ordinances, including those which grant special benefits to persons on account of sex, are in conflict with Executive Order 11246, as amended, or with the requirements of this part, we will regard them as preempted under the Executive order.

§ 60-2.32 Supersedure.

All orders, instructions, regulations, and memoranda of the Secretary of Labor, other officials of the Department of Labor and contracting agencies are hereby superseded to the extent that they are inconsistent herewith, including a previous "Order No. 4" from this office dated January 30, 1970. Nothing in this part is intended to amend 41 CFR Part 60-3 or 41 CFR Part 60-20.

PART 60-3—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

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§ 60-3.17 Policy Statement on Affirmative Action (see section 13B)
§ 60-3.18 Citations

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OMB CONTROL No.: 3046-0017. (47 FR 14696, Apr. 6, 1982)

GENERAL PRINCIPLES

§ 60-3.1 Statement of purpose.

A. *Need for uniformity—Issuing agencies.* The Federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the Federal Government as are applied to other employers.

B. *Purpose of guidelines.* These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

C. *Relation to prior guidelines.* These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession. These guidelines are intended to be consistent with existing law.

§ 60-3.2 Scope.

A. *Application of guidelines.* These guidelines will be applied by the Equal Employment Opportunity Commission in the enforcement of title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (hereinafter "Title VII"); by the Department of Labor, and the contract compliance agencies until the transfer of authority contemplated by the President's Reorganization Plan No. 1 of 1978, in the administration and enforcement of Executive Order 11246, as amended by Executive Order 11375 (hereinafter "Executive Order 11246"); by the Civil Service Commission and other Federal agencies subject to section 717 of Title VII; by the Civil Service Commission in exercising its responsibilities toward State and local governments under section 208(b)(1) of the Intergovernmental-Personnel Act; by the Department of Justice in exercising its responsibilities under Federal law; by the Office of Revenue Sharing of the Department of the Treasury under the State and Local Fiscal Assistance Act of 1972, as amended; and by any other Federal agency which adopts them.

B. *Employment decisions.* These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a

labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law. Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above.

C. *Selection procedures.* These guidelines apply only to selection procedures which are used as a basis for making employment decisions. For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which were previously denied employment opportunities or which are currently underutilized, may be necessary to bring an employer into compliance with Federal law, and is frequently an essential element of any effective affirmative action program; but recruitment practices are not considered by these guidelines to be selection procedures. Similarly, these guidelines do not pertain to the question of the lawfulness of a seniority system within the meaning of section 703(h), Executive Order 11246 or other provisions of Federal law or regulation, except to the extent that such systems utilize selection procedures to determine qualifications or abilities to perform the job. Nothing in these guidelines is intended or should be interpreted as discouraging the use of a selection procedure for the purpose of determining qualifications or for the purpose of selection on the basis of relative qualifications, if the selection procedure had been validated in accord with these guidelines for each such purpose for which it is to be used.

D. *Limitations.* These guidelines apply only to persons subject to Title VII, Executive Order 11246, or other equal employment opportunity requirements of Federal law. These guidelines do not apply to responsibilities under the Age Discrimination in Employment Act of 1967, as amended, not to discriminate on the basis of age, or under sections 501, 503, and 504 of the Rehabilitation Act of 1973, not to discriminate on the basis of handicap.

E. *Indian preference not affected.* These guidelines do not restrict any obligation imposed or right granted by Federal law to users to extend a preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation.

§ 60-3.3 Discrimination defined: Relationship between use of selection procedures and discrimination.

A. *Procedure having adverse impact constitutes discrimination unless justified.* The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied.

B. *Consideration of suitable alternative selection procedures.* Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact. Accordingly, whenever a validity study is called for by these guidelines, the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines. If a user has made a reasonable effort to become aware of such alternative procedures and validity has been demonstrated in accord with these guidelines, the use of the test or other selection procedure may continue until such time as it should reasonably be reviewed for currency. Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine

the appropriateness of using or validating it in accord with these guidelines. This subsection is not intended to preclude the combination of procedures into a significantly more valid procedure, if the use of such a combination has been shown to be in compliance with the guidelines.

§ 60-3.4 Information on impact.

A. *Records concerning impact.* Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in subparagraph B below in order to determine compliance with these guidelines. Where there are large numbers of applicants and procedures are administered frequently, such information may be retained on a sample basis, provided that the sample is appropriate in terms of the applicant population and adequate in size.

B. *Applicable race, sex, and ethnic groups for recordkeeping.* The records called for by this section are to be maintained by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals. The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO-1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly. See sections 4E and 17(4), below.

C. *Evaluation of selection rates. The "bottom line."* If the information called for by sections 4A and B above shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in (1) and (2) above, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

D. *Adverse impact and the "four-fifths rule."* A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and prac-

tical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

E. *Consideration of user's equal employment opportunity posture.* In carrying out their obligations, the Federal enforcement agencies will consider the general posture of the user with respect to equal employment opportunity for the job or group of jobs in question. Where a user has adopted an affirmative action program, the Federal enforcement agencies will consider the provisions of that program, including the goals and timetables which the user has adopted and the progress which the user has made in carrying out that program and in meeting the goals and timetables. While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work.

§ 60-3.5 General standards for validity studies.

A. *Acceptable types of validity studies.* For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below. New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

B. *Criterion-related, content, and construct validity.* Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See 14B below. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D below.

C. *Guidelines are consistent with professional standards.* The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Wash-

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ington, D.C., 1974) (hereinafter "A.P.A. Standards") and standard textbooks and journals in the field of personnel selection.

D. *Need for documentation of validity.* For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in section 15 below.

E. *Accuracy and standardization.* Validity studies should be carried out under conditions which assure insofar as possible the adequacy and accuracy of the research and the report. Selection procedures should be administered and scored under standardized conditions.

F. *Caution against selection on basis of knowledges, skills, or ability learned in brief orientation period.* In general, users should avoid making employment decisions on the basis of measures of knowledges, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

G. *Method of use of selection procedures.* The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. See sections 3B, 14B (5) and (6), and 14C (8) and (9).

H. *Cutoff scores.* Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

I. *Use of selection procedures for higher level jobs.* If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level. A "reasonable period of time" will vary for different jobs and employment situations but will seldom be more than 5 years. Use of selection procedures to evaluate applicants for a higher level job would not be appropriate:

(1) If the majority of those remaining employed do not progress to the higher level job;

(2) If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or

(3) If the selection procedures measure knowledges, skills, or abilities required for advancement which would be expected to develop principally from the training or experience on the job.

J. *Interim use of selection procedures.* Users may continue the use of a selection procedure which is not at the moment fully supported by the required evidence of validity, provided: (1) The user has available substantial evidence of validity, and (2) the user has in progress, when technically feasible, a study which is designed to produce the additional evidence required by these guidelines within a reasonable time. If such a study is not technically feasible, see section 6B. If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a de-

fense in any action, nor shall it relieve the user of any obligations arising under Federal law.

K. *Review of validity studies for currency.* Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review as provided in section 3B above. There are no absolutes in the area of determining the currency of a validity study. All circumstances concerning the study, including the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated.

§ 60-3.6 Use of selection procedures which have not been validated.

A. *Use of alternate selection procedures to eliminate adverse impact.* A user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative action program. See section 13 below. Such alternative procedures should eliminate the adverse impact in the total selection process, should be lawful and should be as job related as possible.

B. *Where validity studies cannot or need not be performed.* There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact, as set forth below.

(1) *Where informal or unscored procedures are used.* When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.

(2) *Where formal and scored procedures are used.* When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accord with Federal law.

§ 60-3.7 Use of other validity studies.

A. *Validity studies not conducted by the user.* Users may, under certain circumstances, support the use of selection procedures by validity studies conducted by other users or conducted by test publishers or distributors and described in test manuals. While publishers of selection procedures have a professional obligation to provide evidence of validity which meets generally accepted professional standards (see section 5C above), users are cautioned that they are responsible for compliance with these guidelines. Accordingly, users seeking to obtain selection procedures from publishers and distributors should be careful to determine that, in the event the user becomes subject to the validity requirements of these guidelines, the necessary information to support validity has been determined and will be made available to the user.

B. *Use of criterion-related validity evidence from other sources.* Criterion-related validity studies conducted by one test user, or described in test manuals and the professional literature, will be considered acceptable for use by another user when the following requirements are met:

(1) *Validity evidence.* Evidence from the available studies meeting the standards of section 14B below clearly demonstrates that the selection procedure is valid;

(2) *Job similarity.* The incumbents in the user's job and the incumbents in the job or group of jobs on which the validity study was conducted perform substantially the same major work behaviors, as shown by appropriate job analyses both on the job or group of jobs on which the validity

study was performed and on the job for which the selection procedure is to be used; and

(3) *Fairness evidence.* The studies include a study of test fairness for each race, sex, and ethnic group which constitutes a significant factor in the borrowing user's relevant labor market for the job or jobs in question. If the studies under consideration satisfy (1) and (2) above but do not contain an investigation of test fairness, and it is not technically feasible for the borrowing user to conduct an internal study of test fairness, the borrowing user may utilize the study until studies conducted elsewhere meeting the requirements of these guidelines show test unfairness, or until such time as it becomes technically feasible to conduct an internal study of test fairness and the results of that study can be acted upon. Users obtaining selection procedures from publishers should consider, as one factor in the decision to purchase a particular selection procedure, the availability of evidence concerning test fairness.

C. *Validity evidence from multiunit study.* If validity evidence from a study covering more than one unit within an organization statisfies the requirements of section 14B below, evidence of validity specific to each unit will not be required unless there are variables which are likely to affect validity significantly.

D. *Other significant variables.* If there are variables in the other studies which are likely to affect validity significantly, the user may not rely upon such studies, but will be expected either to conduct an internal validity study or to comply with section 6 above.

§ 60-3.8 Cooperative studies.

A. *Encouragement of cooperative studies.* The agencies issuing these guidelines encourage employers, labor organizations, and employment agencies to cooperate in research, development, search for lawful alternatives, and validity studies in order to achieve procedures which are consistent with these guidelines.

B. *Standards for use of cooperative studies.* If validity evidence from a cooperative study satisfies the requirements of section 14 below, evidence of validity specific to each user will not be required unless there are variables in the user's situation which are likely to affect validity significantly.

§ 60-3.9 No assumption of validity.

A. *Unacceptable substitutes for evidence of validity.* Under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of it's validity be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on a procedure's name or descriptive labels; all forms of promotional literature; data bearing on the frequency of a procedure's usage; testimonial statements and credentials of sellers, users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes.

B. *Encouragement of professional supervision.* Professional supervision of selection activities is encouraged but is not a substitute for documented evidence of validity. The enforcement agencies will take into account the fact that a thorough job analysis was conducted and that careful development and use of a selection procedure in accordance with professional standards enhance the probability that the selection procedure is valid for the job.

§ 60-3.10 Employment agencies and employment services.

A. *Where selection procedures are devised by agency.* An employment agency, including private employment agencies and State employment agencies, which agrees to a request by an employer or labor organization to devise and utilize a selection procedure should follow the standards in these guidelines for determining adverse impact. If adverse impact exists the agency should comply with these guidelines. An employment agency is not relieved of its obligation herein because the user did not request such validation or has requested the use of some lesser standard of validation than is provided in these guidelines. The use of an employment agency does not relieve an employer or labor

organization or other user of its responsibilities under Federal law to provide equal employment opportunity or its obligations as a user under these guidelines.

B. *Where selection procedures are devised elsewhere.* Where an employment agency or service is requested to administer a selection procedure which has been devised elsewhere and to make referrals pursuant to the results, the employment agency or service should maintain and have available evidence of the impact of the selection and referral procedures which it administers. If adverse impact results the agency or service should comply with these guidelines. If the agency or service seeks to comply with these guidelines by reliance upon validity studies or other data in the possession of the employer, it should obtain and have available such information.

§ 60-3.11 Disparate treatment.

The principles of disparate or unequal treatment must be distinguished from the concepts of validation. A selection procedure—even though validated against job performance in accordance with these guidelines—cannot be imposed upon members of a race, sex, or ethnic group where other employees, applicants, or members have not been subjected to that standard. Disparate treatment occurs where members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, the persons who were in the class of persons discriminated against during the period the user followed the discriminatory practices should be allowed the opportunity to qualify under less stringent selection procedures previously followed, unless the user demonstrates that the increased standards are required by business necessity. This section does not prohibit a user who has not previously followed merit standards from adopting merit standards which are in compliance with these guidelines; nor does it preclude a user who has previously used invalid or unvalidated selection procedures from developing and using procedures which are in accord with these guidelines.

§ 60-3.12 Retesting of applicants.

Users should provide a reasonable opportunity for retesting and reconsideration. Where examinations are administered periodically with public notice, such reasonable opportunity exists, unless persons who have previously been tested are precluded from retesting. The user may however take reasonable steps to preserve the security of its procedures.

§ 60-3.13 Affirmative action.

A. *Affirmative action obligations.* The use of selection procedures which have been validated pursuant to these guidelines does not relieve users of any obligations they may have to undertake affirmative action to assure equal employment opportunity. Nothing in these guidelines is intended to preclude the use of lawful selection procedures which assist in remedying the effects of prior discriminatory practices, or the achievement of affirmative action objectives.

B. *Encouragement of voluntary affirmative action programs.* These guidelines are also intended to encourage the adoption and implementation of voluntary affirmative action programs by users who have no obligation under Federal law to adopt them; but are not intended to impose any new obligations in that regard. The agencies issuing and endorsing these guidelines endorse for all private employers and reaffirm for all governmental employers the Equal Employment Opportunity Coordinating Council's "Policy Statement on Affirmative Action Programs for State and Local Government Agencies" (41 FR 38814, September 13, 1976). That policy statement is attached hereto as appendix, section 17.

TECHNICAL STANDARDS

§ 60-3.14 Technical standards for validity studies.

The following minimum standards, as applicable, should be met in conducting a validity study. Nothing in these guidelines is intended to preclude the development and use of other professionally acceptable techniques with respect to validation of selection procedures. Where it is not technically feasible for a user to conduct a validity study, the user has the obligation otherwise to comply with these guidelines. See sections 6 and 7 above.

A. *Validity studies should be based on review of information about the job.* Any validity study should be based upon a review of information about the job for which the selection procedure is to be used. The review should include a job analysis except as provided in section 14B(3) below with respect to criterion-related validity. Any method of job analysis may be used if it provides the information required for the specific validation strategy used.

B. *Technical standards for criterion-related validity studies*—(1) *Technical feasibility.* Users choosing to validate a selection procedure by a criterion-related validity strategy should determine whether it is technically feasible (as defined in section 16) to conduct such a study in the particular employment context. The determination of the number of persons necessary to permit the conduct of a meaningful criterion-related study should be made by the user on the basis of all relevant information concerning the selection procedure, the potential sample and the employment situation. Where appropriate, jobs with substantially the same major work behaviors may be grouped together for validity studies, in order to obtain an adequate sample. These guidelines do not require a user to hire or promote persons for the purpose of making it possible to conduct a criterion-related study.

(2) *Analysis of the job.* There should be a review of job information to determine measures of work behavior(s) or performance that are relevant to the job or group of jobs in question. These measures or criteria are relevant to the extent that they represent critical or important job duties, work behaviors or work outcomes as developed from the review of job information. The possibility of bias should be considered both in selection of the criterion measures and their application. In view of the possibility of bias in subjective evaluations, supervisory rating techniques and instructions to raters should be carefully developed. All criterion measures and the methods for gathering data need to be examined for freedom from factors which would unfairly alter scores of members of any group. The relevance of criteria and their freedom from bias are of particular concern when there are significant differences in measures of job performance for different groups.

(3) *Criterion measures.* Proper safeguards should be taken to insure that scores on selection procedures do not enter into any judgments of employee adequacy that are to be used as criterion measures. Whatever criteria are used should represent important or critical work behavior(s) or work outcomes. Certain criteria may be used without a full job analysis if the user can show the importance of the criteria to the particular employment context. These criteria include but are not limited to production rate, error rate, tardiness, absenteeism, and length of service. A standardized rating of overall work performance may be used where a study of the job shows that it is an appropriate criterion. Where performance in training is used as a criterion, success in training should be properly measured and the relevance of the training should be shown either through a comparsion of the content of the training program with the critical or important work behavior(s) of the job(s), or through a demonstration of the relationship between measures of performance in training and measures of job performance. Measures of relative success in training include but are not limited to instructor evaluations, performance samples, or tests. Criterion measures consisting of paper and pencil tests will be closely reviewed for job relevance.

(4) *Representativeness of the sample.* Whether the study is predictive or concurrent, the sample subjects should insofar as feasible be representative of the candidates normally available in the relevant labor market for the job or group of jobs in question, and should insofar as feasible include the races, sexes, and ethnic groups normally available in the relevant job market. In determining the representativeness of the sample in a concurrent validity study, the user should take into account the extent to which the specific knowledges or skills which are the primary focus of the test are those which employees learn on the job.

Where samples are combined or compared, attention should be given to see that such samples are comparable in terms of the actual job they perform, the length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or that these factors are included in the design of the study and their effects identified.

(5) *Statistical relationships.* The degree of relationship between selection procedure scores and criterion measures should be examined and computed, using professionally acceptable statistical procedures. Generally, a selection procedure is considered related to the criterion, for the purposes of these guidelines, when the relationship between performance on the procedure and performance on the criterion measure is statistically significant at the 0.05 level of significance, which means that it is sufficiently high as to have a probability of no more than one (1) in twenty (20) to have occurred by chance. Absence of a statistically significant relationship between a selection procedure and job performance should not necessarily discourage other investigations of the validity of that selection procedure.

(6) *Operational use of selection procedures.* Users should evaluate each selection procedure to assure that it is appropriate for operational use, including establishment of cutoff scores or rank ordering. Generally, if other factors reman the same, the greater the magnitude of the relationship (e.g., correlation coefficent) between performance on a selection procedure and one or more criteria of performance on the job, and the greater the importance and number of aspects of job performance covered by the criteria, the more likely it is that the procedure will be appropriate for use. Reliance upon a selection procedure which is significantly related to a criterion measure, but which is based upon a study involving a large number of subjects and has a low correlation coefficient will be subject to close review if it has a large adverse impact. Sole reliance upon a single selection instrument which is related to only one of many job duties or aspects of job performance will also be subject to close review. The appropriateness of a selection procedure is best evaluated in each particular situation and there are no minimum correlation coefficients applicable to all employment situations. In determining whether a selection procedure is appropriate for operational use the following considerations should also be taken into account: The degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity.

(7) *Overstatement of validity findings.* Users should avoid reliance upon techniques which tend to overestimate validity findings as a result of capitalization on chance unless an appropriate safeguard is taken. Reliance upon a few selection procedures or criteria of successful job performance when many selection procedures or criteria of performance have been studied, or the use of optimal statistical weights for selection procedures computed in one sample, are techniques which tend to inflate validity estimates as a result of chance. Use of a large sample is one safeguard: cross-validation is another.

(8) *Fairness.* This section generally calls for studies of unfairness where technically feasible. The concept of fairness or unfairness of selection procedures is a developing concept. In addition, fairness studies generally require substantial numbers of employees in the job or group of jobs being studied. For these reasons, the Federal enforcement agencies recognize that the obligation to conduct studies of

fairness imposed by the guidelines generally will be upon users or groups of users with a large number of persons in a job class, or test developers; and that small users utilizing their own selection procedures will generally not be obligated to conduct such studies because it will be technically infeasible for them to do so.

(a) *Unfairness defined.* When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores.

(b) *Investigation of fairness.* Where a selection procedure results in an adverse impact on a race, sex, or ethnic group identified in accordance with the classifications set forth in section 4 above and that group is a significant factor in the relevant labor market, the user generally should investigate the possible existence of unfairness for that group if it is technically feasible to do so. The greater the severity of the adverse impact on a group, the greater the need to investigate the possible existence of unfairness. Where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue.

(c) *General considerations in fairness investigations.* Users conducting a study of fairness should review the A.P.A. Standards regarding investigation of possible bias in testing. An investigation of fairness of a selection procedure depends on both evidence of validity and the manner in which the selection procedure is to be used in a particular employment context. Fairness of a selection procedure cannot necessarily be specified in advance without investigating these factors. Investigation of fairness of a selection procedure in samples where the range of scores on selection procedures or criterion measures is severely restricted for any subgroup sample (as compared to other subgroup samples) may produce misleading evidence of unfairness. That factor should accordingly be taken into account in conducting such studies and before reliance is placed on the results.

(d) *When unfairness is shown.* If unfairness is demonstrated through a showing that members of a particular group perform better or poorer on the job than their scores on the selection procedure would indicate through comparison with how members of other groups perform, the user may either revise or replace the selection instrument in accordance with these guidelines, or may continue to use the selection instrument operationally with appropriate revisions in its use to assure compatibility between the probability of successful job performance and the probability of being selected.

(e) *Technical feasibility of fairness studies.* In addition to the general conditions needed for technical feasibility for the conduct of a criterion-related study (see section 16, below) an investigation of fairness requires the following:

(i) An adequate sample of persons in each group available for the study to achieve findings of statistical significance. Guidelines do not require a user to hire or promote persons on the basis of group classifications for the purpose of making it possible to conduct a study of fairness; but the user has the obligation otherwise to comply with these guidelines.

(ii) The samples for each group should be comparable in terms of the actual job they perform, length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or such factors should be included in the design of the study and their effects identified.

(f) *Continued use of selection procedures when fairness studies not feasible.* If a study of fairness should otherwise be performed, but is not technically feasible, a selection procedure may be used which has otherwise met the validity standards of these guidelines, unless the technical infeasibility resulted from discriminatory employment practices which are demonstrated by facts other than past failure to

conform with requirements for validation of selection procedures. However, when it becomes technically feasible for the user to perform a study of fairness and such a study is otherwise called for, the user should conduct the study of fairness.

C. *Technical standards for content validity studies*—(1) *Appropriateness of content validity studies.* Users choosing to validate a selection procedure by a content validity strategy should determine whether it is appropriate to conduct such a study in the particular employment context. A selection procedure can be supported by a content validity strategy to the extent that it is a representative sample of the content of the job. Selection procedures which purport to measure knowledges, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples, if the knowledge, skill, or ability measured by the selection procedure can be operationally defined as provided in section 14C(4) below, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance.

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability. Content validity is also not an appropriate strategy when the selection procedure involves knowledges, skills, or abilities which an employee will be expected to learn on the job.

(2) *Job analysis for content validity.* There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them. If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed work products. The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job.

(3) *Development of selection procedures.* A selection procedure designed to measure the work behavior may be developed specifically from the job and job analysis in question, or may have been previously developed by the user, or by other users or by a test publisher.

(4) *Standards for demonstrating content validity.* To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job. In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be operationally defined. In the case of a selection procedure measuring a knowledge, the knowledge being measured should be operationally defined as that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job. In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job. For any selection procedure measuring a knowledge, skill, or ability the user should show that (a) the selection procedure measures and is a representative sample of that knowledge, skill, or ability; and (b) that knowledge, skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behavior(s). In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and

its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

(5) *Reliability.* The reliability of selection procedures justified on the basis of content validity should be a matter of concern to the user. Whenever it is feasible, appropriate statistical estimates should be made of the reliability of the selection procedure.

(6) *Prior training or experience.* A requirement for or evaluation of specific prior training or experience based on content validity, including a specification of level or amount of training or experience, should be justified on the basis of the relationship between the content of the training or experience and the content of the job for which the training or experience is to be required or evaluated. The critical consideration is the resemblance between the specific behaviors, products, knowledges, skills, or abilities in the experience or training and the specific behaviors, products, knowledges, skills, or abilities required on the job, whether or not there is close resemblance between the experience or training as a whole and the job as a whole.

(7) *Content validity of training success.* Where a measure of success in a training program is used as a selection procedure and the content of a training program is justified on the basis of content validity, the use should be justified on the relationship between the content of the training program and the content of the job.

(8) *Operational use.* A selection procedure which is supported on the basis of content validity may be used for a job if it represents a critical work behavior (i.e., a behavior which is necessary for performance of the job) or work behaviors which constitute most of the important parts of the job.

(9) *Ranking based on content validity studies.* If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

D. *Technical standards for construct validity studies*—(1) *Appropriateness of construct validity studies.* Construct validity is a more complex strategy than either criterion-related or content validity. Construct validation is a relatively new and developing procedure in the employment field, and there is at present a lack of substantial literature extending the concept to employment practices. The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion related validity studies and which may include content validity studies. Users choosing to justify use of a selection procedure by this strategy should therefore take particular care to assure that the validity study meets the standards set forth below.

(2) *Job analysis for construct validity studies.* There should be a job analysis. This job analysis should show the work behavior(s) required for successful performance of the job, or the groups of jobs being studied, the critical or important work behavior(s) in the job or group of jobs being studied, and an identification of the construct(s) believed to underlie successful performance of these critical or important work behaviors in the job or jobs in question. Each construct should be named and defined, so as to distinguish it from other constructs. If a group of jobs is being studied the jobs should have in common one or more critical or important work behaviors at a comparable level of complexity.

(3) *Relationship to the job.* A selection procedure should then be identified or developed which measures the construct identified in accord with subparagraph (2) above. The user should show by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly related to the performance of critical or important work behavior(s). The relationship between the construct as measured by the selection procedure and the related work behavior(s) should be supported by empirical evidence from one or more criterion-related studies involving the job or jobs in question which satisfy the provisions of section 14B above.

(4) *Use of construct validity study without new criterion-related evidence*—(a) *Standards for use.* Until such time as professional literature provides more guidance on the use of construct validity in employment situations, the Federal agencies will accept a claim of construct validity without a criterion-related study which satisfies section 14B above only when the selection procedure has been used elsewhere in a situation in which a criterion-related study has been conducted and the use of a criterion-related validity study in this context meets the standards for transportability of criterion-related validity studies as set forth above in section 7. However, if a study pertains to a number of jobs having common critical or important work behaviors at a comparable level of complexity, and the evidence satisfies subparagraphs 14B (2) and (3) above for those jobs with criterion-related validity evidence for those jobs, the selection procedure may be used for all the jobs to which the study pertains. If construct validity is to be generalized to other jobs or groups of jobs not in the group studied, the Federal enforcement agencies will expect at a minimum additional empirical research evidence meeting the standards of subparagraphs section 14B (2) and (3) above for the additional jobs or groups of jobs.

(b) *Determination of common work behaviors.* In determining whether two or more jobs have one or more work behavior(s) in common, the user should compare the observed work behavior(s) in each of the jobs and should compare the observed work product(s) in each of the jobs. If neither the observed work behavior(s) in each of the jobs nor the observed work product(s) in each of the jobs are the same, the Federal enforcement agencies will presume that the work behavior(s) in each job are different. If the work behaviors are not observable, then evidence of similarity of work products and any other relevant research evidence will be considered in determining whether the work behavior(s) in the two jobs are the same.

Documentation of Impact and Validity Evidence

§ 60-3.15 Documentation of impact and validity evidence.

A. *Required information.* Users of selection procedures other than those users complying with section 15A(1) below should maintain and have available for each job information on adverse impact of the selection process for that job and, where it is determined a selection process has an adverse impact, evidence of validity as set forth below.

(1) *Simplified recordkeeping for users with less than 100 employees.* In order to minimize recordkeeping burdens on employers who employ one hundred (100) or fewer employees, and other users not required to file EEO-1, et seq., reports, such users may satisfy the requirements of this section 15 if they maintain and have available records showing, for each year:

(a) The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin;

(b) The number of applicants for hire and promotion by sex and where appropriate by race and national origin; and

(c) The selection procedures utilized (either standardized or not standardized).

These records should be maintained for each race or national origin group (see section 4 above) constituting more than two percent (2%) of the labor force in the relevant labor area. However, it is not necessary to maintain re-

cords by race and/or national origin (see § 4 above) if one race or national origin group in the relevant labor area constitutes more than ninety-eight percent (98%) of the labor force in the area. If the user has reason to believe that a selection procedure has an adverse impact, the user should maintain any available evidence of validity for that procedure (see sections 7A and 8).

(2) *Information on impact*—(a) *Collection of information on impact.* Users of selection procedures other than those complying with section 15A(1) above should maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact on any of the groups for which records are called for by sections 4B above. Adverse impact determinations should be made at least annually for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce. Where a total selection process for a job has an adverse impact, the user should maintain and have available records or other information showing which components have an adverse impact. Where the total selection process for a job does not have an adverse impact, information need not be maintained for individual components except in circumstances set forth in subsection 15A(2)(b) below. If the determination of adverse impact is made using a procedure other than the "four-fifths rule," as defined in the first sentence of section 4D above, a justification, consistent with section 4D above, for the procedure used to determine adverse impact should be available.

(b) *When adverse impact has been eliminated in the total selection process.* Whenever the total selection process for a particular job has had an adverse impact, as defined in section 4 above, in any year, but no longer has an adverse impact, the user should maintain and have available the information on individual components of the selection process required in the preceding paragraph for the period in which there was adverse impact. In addition, the user should continue to collect such information for at least two (2) years after the adverse impact has been eliminated.

(c) *When data insufficient to determine impact.* Where there has been an insufficient number of selections to determine whether there is an adverse impact of the total selection process for a particular job, the user should continue to collect, maintain and have available the information on individual components of the selection process required in section 15(A)(2)(a) above until the information is sufficient to determine that the overall selection process does not have an adverse impact as defined in section 4 above, or until the job has changed substantially.

(3) *Documentation of validity evidence*—(a) *Types of evidence.* Where a total selection process has an adverse impact (see section 4 above) the user should maintain and have available for each component of that process which has an adverse impact, one or more of the following types of documentation evidence:

(i) Documentation evidence showing criterion-related validity of the selection procedure (see section 15B, below).

(ii) Documentation evidence showing content validity of the selection procedure (see section 15C, below).

(iii) Documentation evidence showing construct validity of the selection procedure (see section 15D, below).

(iv) Documentation evidence from other studies showing validity of the selection procedure in the user's facility (see section 15E, below).

(v) Documentation evidence showing why a validity study cannot or need not be performed and why continued use of the procedure is consistent with Federal law.

(b) *Form of report.* This evidence should be compiled in a reasonably complete and organized manner to permit direct evaluation of the validity of the selection procedure. Previously written employer or consultant reports of validity, or reports describing validity studies completed before the issuance of these guidelines are acceptable if they are complete in regard to the documentation requirements contained in this section, or if they satisfied requirements of guidelines

which were in effect when the validity study was completed. If they are not complete, the required additional documentation should be appended. If necessary information is not available the report of the validity study may still be used as documentation, but its adequacy will be evaluated in terms of compliance with the requirements of these guidelines.

(c) *Completeness.* In the event that evidence of validity is reviewed by an enforcement agency, the validation reports completed after the effective date of these guidelines are expected to contain the information set forth below. Evidence denoted by use of the word "(Essential)" is considered critical. If information denoted essential is not included, the report will be considered incomplete unless the user affirmatively demonstrates either its unavailability due to circumstances beyond the user's control or special circumstances of the user's study which make the information irrelevant. Evidence not so denoted is desirable but its absence will not be a basis for considering a report incomplete. The user should maintain and have available the information called for under the heading "Source Data" in sections 15B(11) and 15D(11). While it is a necessary part of the study, it need not be submitted with the report. All statistical results should be organized and presented in tabular or graphic form to the extent feasible.

B. *Criterion-related validity studies.* Reports of criterion-related validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Dates and location(s) of the job analysis or review of job information, the date(s) and location(s) of the administration of the selection procedures and collection of criterion data, and the time between collection of data on selection procedures and criterion measures should be provided (Essential). If the study was conducted at several locations, the address of each location, including city and State, should be shown.

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis or review of job information.* A description of the procedure used to analyze the job or group of jobs, or to review the job information should be provided (Essential). Where a review of job information results in criteria which may be used without a full job analysis (see section 14B(3)), the basis for the selection of these criteria should be reported (Essential). Where a job analysis is required a complete description of the work behavior(s) or work outcome(s), and measures of their criticality or importance should be provided (Essential). The report should describe the basis on which the behavior(s) or outcome(s) were determined to be critical or important, such as the proportion of time spent on the respective behaviors, their level of difficulty, their frequency of performance, the consequences of error, or other appropriate factors (Essential). Where two or more jobs are grouped for a validity study, the information called for in this subsection should be provided for each of the jobs, and the justification for the grouping (see section 14B(1)) should be provided (essential).

(4) *Job titles and codes.* It is desirable to provide the user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from U.S. Employment Service's Dictionary of Occupational Titles.

(5) *Criterion measures.* The bases for the selection of the criterion measures should be provided, together with references to the evidence considered in making the selection of criterion measures (essential). A full description of all criteria on which data were collected and means by which they were observed, recorded, evaluated, and quantified, should be provided (essential). If rating techniques are used as criterion measures, the appraisal form(s) and instructions to the rater(s) should be included as part of the validation evidence, or should be explicitly described and available (essential). All steps taken to insure that criterion measures are free from factors which would unfairly alter the

scores of members of any group should be described (essential).

(6) *Sample description.* A description of how the research sample was identified and selected should be included (essential). The race, sex, and ethnic composition of the sample, including those groups set forth in section 4A above, should be described (essential). This description should include the size of each subgroup (essential). A description of how the research sample compares with the relevant labor market or work force, the method by which the relevant labor market or work force was defined, and a discussion of the likely effects on validity of differences between the sample and the relevant labor market or work force, are also desirable. Descriptions of educational levels, length of service, and age are also desirable.

(7) *Description of selection procedures.* Any measure, combination of measures, or procedure studied should be completely and explicitly described or attached (essential). If commercially available selection procedures are studied, they should be described by title, form, and publisher (essential). Reports of reliability estimates and how they were established are desirable.

(8) *Techniques and results.* Methods used in analyzing data should be described (essential). Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations and ranges) for all selection procedures and all criteria should be reported for each race, sex, and ethnic group which constitutes a significant factor in the relevant labor market (essential). The magnitude and direction of all relationships between selection procedures and criterion measures investigated should be reported for each relevant race, sex, and ethnic group and for the total group (essential). Where groups are too small to obtain reliable evidence of the magnitude of the relationship, need not be reported separately. Statements regarding the statistical significance of results should be made (essential). Any statistical adjustments, such as for less then perfect reliability or for restriction of score range in the selection procedure or criterion should be described and explained; and uncorrected correlation coefficients should also be shown (essential). Where the statistical technique categorizes continuous data, such as biserial correlation and the phi coefficient, the categories and the bases on which they were determined should be described and explained (essential). Studies of test fairness should be included where called for by the requirements of section 14B(8) (essential). These studies should include the rationale by which a selection procedure was determined to be fair to the group(s) in question. Where test fairness or unfairness has been demonstrated on the basis of other studies, a bibliography of the relevant studies should be included (essential). If the bibliography includes unpublished studies, copies of these studies, or adequate abstracts or summaries, should be attached (essential). Where revisions have been made in a selection procedure to assure compatability between successful job performance and the probability of being selected, the studies underlying such revisions should be included (essential). All statistical results should be organized and presented by relevant race, sex, and ethnic group (essential).

(9) *Alternative procedures investigated.* The selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(10) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite

should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(11) *Source data.* Each user should maintain records showing all pertinent information about individual sample members and raters where they are used, in studies involving the validation of selection procedures. These records should be made available upon request of a compliance agency. In the case of individual sample members these data should include scores on the selection procedure(s), scores on criterion measures, age, sex, race, or ethnic group status, and experience on the specific job on which the validation study was conducted, and may also include such things as education, training, and prior job experience, but should not include names and social security numbers. Records should be maintained which show the ratings given to each sample member by each rater.

(12) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(13) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

C. *Content validity studies.* Reports of content validity for a selection procedure should include the following information:

(1) *User(s), location(s) and date(s) of study.* Dates and location(s) of the job analysis should be shown (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis—Content of the job.* A description of the method used to analyze the job should be provided (essential). The work behavior(s), the associated tasks, and, if the behavior results in a work product, the work products should be completely described (essential). Measures of criticality and/or importance of the work behavior(s) and the method of determining these measures should be provided (essential). Where the job analysis also identified the knowledges, skills, and abilities used in work behavior(s), an operational definition for each knowledge in terms of a body of learned information and for each skill and ability in terms of observable behaviors and outcomes, and the relationship between each knowledge, skill, or ability and each work behavior, as well as the method used to determine this relationship, should be provided (essential). The work situation should be described, including the setting in which work behavior(s) are performed, and where appropriate, the manner in which knowledges, skills, or abilities are used, and the complexity and difficulty of the knowledge, skill, or ability as used in the work behavior(s).

(4) *Selection procedure and its content.* Selection procedures, including those constructed by or for the user, specific training requirements, composites of selection procedures, and any other procedure supported by content validity, should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be described by title, form, and publisher (essential). The behaviors measured or sampled by the selection procedure should be explicitly described (essential). Where the selection procedure purports to measure a knowledge, skill, or ability, evidence that the selection procedure measures and is a representative sample of the knowledge, skill, or ability should be provided (essential).

(5) *Relationship between the selection procedure and the job.* The evidence demonstrating that the selection procedure is a representative work sample, a representative sample of the work behavior(s), or a representative sample of a knowledge, skill, or ability as used as a part of a work behavior and necessary for that behavior should be provided (essential). The user should identify the work

behavior(s) which each item or part of the selection procedure is intended to sample or measure (essential). Where the selection procedure purports to sample a work behavior or to provide a sample of a work product, a comparison should be provided of the manner, setting, and the level of complexity of the selection procedure with those of the work situation (essential). If any steps were taken to reduce adverse impact on a race, sex, or ethnic group in the content of the procedure or in its administration, these steps should be described. Establishment of time limits, if any, and how these limits are related to the speed with which duties must be performed on the job, should be explained. Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations) and estimates of realibility should be reported for all selection procedures if available. Such reports should be made for relevant race, sex, and ethnic subgroups, at least on a statistically reliable sample basis.

(6) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(7) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential). In addition, if the selection procedure is to be used for ranking, the user should specify the evidence showing that a higher score on the selection procedure is likely to result in better job performance.

(8) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(9) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

D. *Construct validity studies.* Reports of construct validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Date(s) and location(s) of the job analysis and the gathering of other evidence called for by these guidelines should be provided (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Construct definition.* A clear definition of the construct(s) which are believed to underlie successful performance of the critical or important work behavior(s) should be provided (essential). This definition should include the levels of construct performance relevant to the job(s) for which the selection procedure is to be used (essential). There should be a summary of the position of the construct in the psychological literature, or in the absence of such a position, a description of the way in which the definition and measurement of the construct was developed and the psychological theory underlying it (essential). Any quantitative data which identify or define the job constructs, such as factor analyses, should be provided (essential).

(4) *Job analysis.* A description of the method used to analyze the job should be provided (essential). A complete description of the work behavior(s) and, to the extent appropriate, work outcomes and measures of their criticality

and/or importance should be provided (essential). The report should also describe the basis on which the behavior(s) or outcomes were determined to be important, such as their level of difficulty, their frequency of performance, the consequences of error or other appropriate factors (essential). Where jobs are grouped or compared for the purposes of generalizing validity evidence, the work behavior(s) and work product(s) for each of the jobs should be described, and conclusions concerning the similarity of the jobs in terms of observable work behaviors or work products should be made (essential).

(5) *Job titles and codes.* It is desirable to provide the selection procedure user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from the United States Employment Service's dictionary of occupational titles.

(6) *Selection procedure.* The selection procedure used as a measure of the construct should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be identified by title, form and publisher (essential). The research evidence of the relationship between the selection procedure and the construct, such as factor structure, should be included (essential). Measures of central tendency, variability and reliability of the selection procedure should be provided (essential). Whenever feasible, these measures should be provided separately for each relevant race, sex and ethnic group.

(7) *Relationship to job performance.* The criterion-related study(ies) and other empirical evidence of the relationship between the construct measured by the selection procedure and the related work behavior(s) for the job or jobs in question should be provided (essential). Documentation of the criterion-related study(ies) should satisfy the provisions of section 15B above or section 15E(1) below, except for studies conducted prior to the effective date of these guidelines (essential). Where a study pertains to a group of jobs, and, on the basis of the study, validity is asserted for a job in the group, the observed work behaviors and the observed work products for each of the jobs should be described (essential). Any other evidence used in determining whether the work behavior(s) in each of the jobs is the same should be fully described (essential).

(8) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings should be fully described (essential).

(9) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(10) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

(11) *Source data.* Each user should maintain records showing all pertinent information relating to its study of construct validity.

(12) *Contact person.* The name, mailing address, and telephone number of the individual who may be contacted for further information about the validity study should be provided (essential).

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E. *Evidence of validity from other studies.* When validity of a selection procedure is supported by studies not done by the user, the evidence from the original study or studies should be compiled in a manner similar to that required in the appropriate section of this section 15 above. In addition, the following evidence should be supplied:

(1) *Evidence from criterion-related validity studies*—a. *Job information.* A description of the important job behavior(s) of the user's job and the basis on which the behaviors were determined to be important should be provided (essential). A full description of the basis for determining that these important work behaviors are the same as those of the job in the original study (or studies) should be provided (essential).

b. *Relevance of criteria.* A full description of the basis on which the criteria used in the original studies are determined to be relevant for the user should be provided (essential).

c. *Other variables.* The similarity of important applicant pool or sample characteristics reported in the original studies to those of the user should be described (essential). A description of the comparison between the race, sex and ethnic composition of the user's relevant labor market and the sample in the original validity studies should be provided (essential).

d. *Use of the selection procedure.* A full description should be provided showing that the use to be made of the selection procedure is consistent with the findings of the original validity studies (essential).

e. *Bibliography.* A bibliography of reports of validity of the selection procedure for the job or jobs in question should be provided (essential). Where any of the studies included an investigation of test fairness, the results of this investigation should be provided (essential). Copies of reports published in journals that are not commonly available should be described in detail or attached (essential). Where a user is relying upon unpublished studies, a reasonable effort should be made to obtain these studies. If these unpublished studies are the sole source of validity evidence they should be described in detail or attached (essential). If these studies are not available, the name and address of the source, an adequate abstract or summary of the validity study and data, and a contact person in the source organization should be provided (essential).

(2) *Evidence from content validity studies.* See section 14C(3) and section 15C above.

(3) *Evidence from construct validity studies.* See sections 14D(2) and 15D above.

F. *Evidence of validity from cooperative studies.* Where a selection procedure has been validated through a cooperative study, evidence that the study satisfies the requirements of sections 7, 8 and 15E should be provided (essential).

G. *Selection for higher level job.* If a selection procedure is used to evaluate candidates for jobs at a higher level than those for which they will initially be employed, the validity evidence should satisfy the documentation provisions of this section 15 for the higher level job or jobs, and in addition, the user should provide: (1) a description of the job progression structure, formal or informal; (2) the data showing how many employees progress to the higher level job and the length of time needed to make this progression; and (3) an identification of any anticipated changes in the higher level job. In addition, if the test measures a knowledge, skill or ability, the user should provide evidence that the knowledge, skill or ability is required for the higher level job and the basis for the conclusion that the knowledge, skill or ability is not expected to develop from the training or experience on the job.

H. *Interim use of selection procedures.* If a selection procedure is being used on an interim basis because the procedure is not fully supported by the required evidence of validity, the user should maintain and have available (1) substantial evidence of validity for the procedure, and (2) a report showing the date on which the study to gather the additional evidence commenced, the estimated completion date of the study, and a description of the data to be collected (essential).

DEFINITIONS

§ 60-3.16 Definitions.

The following definitions shall apply throughout these guidelines:

A. *Ability.* A present competence to perform an observable behavior or a behavior which results in an observable product.

B. *Adverse impact.* A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group. See section 4 of these guidelines.

C. *Compliance with these guidelines.* Use of a selection procedure is in compliance with these guidelines if such use has been validated in accord with these guidelines (as defined below), or if such use does not result in adverse impact on any race, sex, or ethnic group (see section 4, above), or, in unusual circumstances, if use of the procedure is otherwise justified in accord with Federal law. See section 6B, above.

D. *Content validity.* Demonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job. See section 5B and section 14C.

E. *Construct validity.* Demonstrated by data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance. See section 5B and section 14D.

F. *Criterion-related validity.* Demonstrated by empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of work behavior. See sections 5B and 14B.

G. *Employer.* Any employer subject to the provisions of the Civil Rights Act of 1964, as amended, including State or local governments and any Federal agency subject to the provisions of section 717 of the Civil Rights Act of 1964, as amended, and any Federal contractor or subcontractor or federally assisted construction contractor or subcontactor covered by Executive Order 11246, as amended.

H. *Employment agency.* Any employment agency subject to the provisions of the Civil Rights Act of 1964, as amended.

I. *Enforcement action.* For the purposes of section 4 a proceeding by a Federal enforcement agency such as a lawsuit or an administrative proceeding leading to debarment from or withholding, suspension, or termination of Federal Government contracts or the suspension or withholding of Federal Government funds; but not a finding of reasonable cause or a conciliation process or the issuance of right to sue letters under title VII or under Executive Order 11246 where such finding, conciliation, or issuance of notice of right to sue is based upon an individual complaint.

J. *Enforcement agency.* Any agency of the executive branch of the Federal Government which adopts these guidelines for purposes of the enforcement of the equal employment opportunity laws or which has responsibility for securing compliance with them.

K. *Job analysis.* A detailed statement of work behaviors and other information relevant to the job.

L. *Job description.* A general statement of job duties and responsibilities.

M. *Knowledge.* A body of information applied directly to the performance of a function.

N. *Labor organization.* Any labor organization subject to the provisions of the Civil Rights Act of 1964, as amended, and any committee subject thereto controlling apprenticeship or other training.

O. *Observable.* Able to be seen, heard, or otherwise perceived by a person other than the person performing the action.

P. *Race, sex, or ethnic group.* Any group of persons identifiable on the grounds of race, color, religion, sex, or national origin.

Q. *Selection procedure.* Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through in-

formal or casual interviews and unscored application forms.

R. *Selection rate.* The proportion of applicants or candidates who are hired, promoted, or otherwise selected.

S. *Should.* The term "should" as used in these guidelines is intended to connote action which is necessary to achieve compliance with the guidelines, while recognizing that there are circumstances where alternative courses of action are open to users.

T. *Skill.* A present, observable competence to perform a learned psychomoter act.

U. *Technical feasibility.* The existence of conditions permitting the conduct of meaningful criterion-related validity studies. These conditions include: (1) An adequate sample of persons available for the study to achieve findings of statistical significance; (2) having or being able to obtain a sufficient range of scores on the selection procedure and job performance measures to produce validity results which can be expected to be representative of the results if the ranges normally expected were utilized; and (3) having or being able to devise unbiased, reliable and relevant measures of job performance or other criteria of employee adequacy. See section 14B(2). With respect to investigation of possible unfairness, the same considerations are applicable to each group for which the study is made. See section 14B(8).

V. *Unfairness of selection procedure.* A condition in which members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences are not reflected in differences in measures of job performance. See section 14B(7).

W. *User.* Any employer, labor organization, employment agency, or licensing or certification board, to the extent it may be covered by Federal equal employment opportunity law, which uses a selection procedure as a basis for any employment decision. Whenever an employer, labor organization, or employment agency is required by law to restrict recruitment for any occupation to those applicants who have met licensing or certification requirements, the licensing or certifying authority to the extent it may be covered by Federal equal employment opportunity law will be considered the user with respect to those licensing or certification requirements. Whenever a State employment agency or service does no more than administer or monitor a procedure as permitted by Department of Labor regulations, and does so without making referrals or taking any other action on the basis of the results, the State employment agency will not be deemed to be a user.

X. *Validated in accord with these guidelines or properly validated.* A demonstration that one or more validity study or studies meeting the standards of these guidelines has been conducted, including investigation and, where appropriate, use of suitable alternative selection procedures as contemplated by section 3B, and has produced evidence of validity sufficient to warrant use of the procedure for the intended purpose under the standards of these guidelines.

Y. *Work behavior.* An activity performed to achieve the objectives of the job. Work behaviors involve observable (physical) components and unobservable (mental) components. A work behavior consists of the performance of one or more tasks. Knowledges, skills, and abilities are not behaviors, although they may be applied in work behaviors.

Appendix

§ 60-3.17 Policy statement on affirmative action (see section 13B).

The Equal Employment Opportunity Coordinating Council was established by act of Congress in 1972, and charged with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal Government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin. This statement is issued as an initial response to the requests of a number of State and local officials for clarification of the Government's policies concerning the role of affirmative action in the overall equal employ-

ment opportunity program. While the Coordinating Council's adoption of this statement expresses only the views of the signatory agencies concerning this important subject, the principles set forth below should serve as policy guidance for other Federal agencies as well.

(1) Equal employment opportunity is the law of the land. In the public sector of our society this means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job. There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. The remedy for such past and present discrimination is twofold.

On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial, or ethnic characteristics. Without such efforts equal employment opportunity is no more than a wish. The importance of voluntary affirmative action on the part of employers is underscored by title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations—all of which emphasize voluntary action to achieve equal employment opportunity.

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the Council urges all State and local governments to develop and implement results oriented affirmative action plans which deal with the problems so identified.

The following paragraphs are intended to assist State and local governments by illustrating the kinds of analyses and activities which may be appropriate for a public employer's voluntary affirmative action plan. This statement does not address remedies imposed after a finding of unlawful discrimination.

(2) Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether precentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the precentages of those groups available in the relevant job market who possess the basic job-related qualifications.

When substantial disparities are found through such analyses, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

(3) When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex, or ethnic "conscious," include, but are not limited to, the following:

(a) The establishment of a long-term goal, and short-range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

(b) A recruitment program designed to attract qualified members of the group in question;

(c) A systematic effort to organize work and redesign jobs in ways that provide opportunities for persons lacking "journeyman" level knowledge or skills to enter and, with appropriate training, to progress in a career field;

(d) Revamping selection instruments or procedures which have not yet been validated in order to reduce or elimi-

nate exclusionary effects on particular groups in particular job classifications;

(e) The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

(f) A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

(g) The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(4) The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Accordingly, the Council has not attempted to set forth here either the minimum or maximum voluntary steps that employers may take to deal with their respective situations. Rather, the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited to their particular situations. In this manner, the Council believes that affirmative action programs will best serve the goal of equal employment opportunity.

Respectfully submitted,

Harold R. Tyler, Jr.,
Deputy Attorney General and Chairman of the Equal Employment Coordinating Council.

Michael H. Moskow,
Under Secretary of Labor.

Ethel Bent Walsh,
Acting Chairman, Equal Employment Opportunity Commission.

Robert E. Hampton,
Chairman, Civil Service Commission.

Arthur E. Flemming,
Chairman, Commission on Civil Rights.

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.

Done this 26th day of August 1976.

Richard Albrecht,
General Counsel,
Department of the Treasury.

§ 60-3.18 Citations.

The official title of these guidelines is "Uniform Guidelines on Employee Selection Procedures (1978)". The Uniform Guidelines on Employee Selection Procedures (1978) are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. These guidelines have been adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission.

The official citation is:

"Section ——, Uniform Guidelines on Employee Selection Procedure (1978); 43 FR —— (August 25, 1978)."

The short form citation is:

"Section ——, U.G.E.S.P. (1978); 43 FR —— (August 25, 1978)."

When the guidelines are cited in connection with the activities of one of the issuing agencies, a specific citation to the regulations of that agency can be added at the end of the above citation. The specific additional citations are as follows:

Equal Employment Opportunity Commission
29 CFR Part 1607
Department of Labor
Office of Federal Contract Compliance Programs

41 CFR Part 60-3
Department of Justice
28 CFR 50.14
Civil Service Commission
5 CFR 300.103(c)

Normally when citing these guidelines, the section number immediately preceding the title of the guidelines will be from these guidelines series 1-18. If a section number from the codification for an individual agency is needed it can also be added at the end of the agency citation. For example, section 6A of these guidelines could be cited for EEOC as follows: "Section 6A, Uniform Guidelines on Employee Selection Procedures (1978); 43 FR ——, (August 25, 1978); 29 CFR Part 1607, section 6A."

PART 60-4—CONSTRUCTION CONTRACTORS—AFFIRMATIVE ACTION REQUIREMENTS

Sec.
60-4.1 Scope and application.
60-4.2 Solicitations.
60-4.3 Equal opportunity clauses.
60-4.4 Affirmative action requirements.
60-4.5 Hometown plans
60-4.6 Goals and timetables.
60-4.7 Effect on other regulations.
60-4.8 Show cause notice.
60-4.9 Incorporation by operation of the Order.

AUTHORITY: Secs. 201, 202, 205, 211, 301, 302, and 303 of E.O. 11246, as amended, 30 FR 12319; 32 FR 14303, as amended by E.O. 12086.

SOURCE: 43 FR 49254, Oct. 20, 1978, unless otherwise noted.

OMB CONTROL No.: 1215-0072. (47 FR 14696, Apr. 6, 1982)

§ 60-4.1 Scope and application.

This part applies to all contractors and subcontractors which hold any Federal or federally assisted construction contract in excess of $10,000. The regulations in this part are applicable to all of a construction contractor's or subcontractor's construction employees who are engaged in on site construction including those construction employees who work on a non-Federal or nonfederally assisted construction site. This part also establishes procedures which all Federal contracting officers and all applicants, as applicable, shall follow in soliciting for and awarding Federal or federally assisted construction contracts. Procedures also are established which administering agencies shall follow in making any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of Executive Order 11246, as amended.

In addition, this part applies to construction work performed by construction contractors and subcontractors for Federal nonconstruction contractors and subcontractors if the construction work is necessary in whole or in part to the performance of a nonconstruction contract or subcontract.

[43 FR 49254, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-4.2 Solicitations.

(a) All Federal contracting officers and all applicants shall include the notice set forth in paragraph (d) of this section and the Standard Federal Equal Employment Opportunity Construction Contract Specifications set forth in § 60-4.3 of this part in all solicitations for offers and bids on all Federal and federally assisted construction contracts or subcontracts to be performed in geographical areas designated by the Director pursuant to § 60-4.6 of the part. Administering agencies shall require the inclusion of the notice set forth in paragraph (d) of this section and the specifications set forth in § 60-4.3 of this part as a condition of any grant, contract, subcontract, loan, insurance or guarantee involving federally assisted construction covered by this part 60-4.

(b) All nonconstruction contractors covered by Executive Order 11246 and the implementing regulations shall include the notice in paragraph (d) of this section in all construction agreements which are necessary in whole or in part to the performance of the covered nonconstruction contract.

(c) Contracting officers, applicants and nonconstruction contractors shall given written notice to the Director within 10 working days of award of a contract subject to these provisions. The notification shall include the name, address and telephone number of the contractor; employer identifica-

tion number; dollar amount of the contract, estimated starting and completion dates of the contract; the contract number; and geographical area in which the contract is to be performed.

(d) The following notice shall be included in, and shall be a part of, all solicitations for offers and bids on all Federal and federally assisted construction contracts or subcontracts in excess of $10,000 to be performed in geographical areas designated by the Director pursuant to § 60-4.6 of this part (see 41 CFR 60-4.2(a)):

NOTICE OF REQUIREMENT FOR AFFIRMATIVE ACTION TO ENSURE EQUAL EMPLOYMENT OPPORTUNITY (EXECUTIVE ORDER 11246)

1. The Offeror's or Bidder's attention is called to the "Equal Opportunity Clause" and the "Standard Federal Equal Employment Specifications" set forth herein.

2. The goals and timetables for minority and female participation, expressed in percentage terms for the Contractor's aggregate workforce in each trade on all construction work in the covered area, are as follows:

Timetables	Goals for minority participation for each trade	Goals for female participation in each trade
	Insert goals for each year.	Insert goals for each year.

These goals are applicable to all the Contractor's construction work (whether or not it is Federal or federally assisted) performed in the covered area. If the contractor performs construction work in a geographical area located outside of the covered area, it shall apply the goals established for such geographical area where the work is actually performed. With regard to this second area, the contractor also is subject to the goals for both its federally involved and nonfederally involved construction.

The Contractor's compliance with the Executive Order and the regulations in 41 CFR Part 60-4 shall be based on its implementation of the Equal Opportunity Clause, specific affirmative action obligations required by the specifications set forth in 41 CFR 60-4.3(a), and its efforts to meet the goals. The hours of minority and female employment and training must be substantially uniform throughout the length of the contract, and in each trade, and the contractor shall make a good faith effort to employ minorities and women evenly on each of its projects. The transfer of minority or female employees or trainees from Contractor to Contractor or from project to project for the sole purpose of meeting the Contractor's goals shall be a violation of the contract, the Executive Order and the regulations in 41 CFR Part 60-4. Compliance with the goals will be measured against the total work hours performed.

3. The Contractor shall provide written notification to the Director of the Office of Federal Contract Compliance Programs within 10 working days of award of any construction subcontract in excess of $10,000 at any tier for construction work under the contract resulting from this solicitation. The notification shall list the name, address and telephone number of the subcontractor; employer identification number of the subcontractor; estimated dollar amount of the subcontract; estimated starting and completion dates of the subcontract; and the geographical area in which the subcontract is to be performed.

4. As used in this Notice, and in the contract resulting from this solicitation, the "covered area" is (insert description of the geographical areas where the contract is to be performed giving the state, county and city, if any).

[43 FR 49254, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978, as amended at 45 FR 65977, Oct. 3, 1980]

§ 60-4.3 Equal opportunity clauses.

(a) The equal opportunity clause published at 41 CFR 60-1.4(a) of this chapter is required to be included in, and is part of, all nonexempt Federal contracts and subcontracts, including construction contracts and subcontracts. The equal opportunity clause published at 41 CFR 60-1.4(b) is required to be included in, and is a part of, all nonexempt federally assisted construction contracts and subcontracts. In addition to the clauses described above, all Federal contracting officers, all applicants and all nonconstruction contractors, as applicable, shall include the specifications set forth in this section in all Federal and federally assisted construction contracts in excess of $10,000 to be performed in geographical areas designated by the Director pursuant to § 60-4.6 of this part and in construction subcontracts in excess of $10,000 necessary in whole or in part to the performance of nonconstruction Federal contracts and subcontracts covered under the Executive order.

STANDARD FEDERAL EQUAL EMPLOYMENT OPPORTUNITY CONSTRUCTION CONTRACT SPECIFICATIONS (EXECUTIVE ORDER 11246)

1. As used in these specifications:

a. "Covered area" means the geographical area described in the solicitation from which this contract resulted;

b. "Director" means Director, Office of Federal Contract Compliance Programs, United States Department of Labor, or any person to whom the Director delegates authority;

c. "Employer identification number" means the Federal Social Security number used on the Employer's Quarterly Federal Tax Return, U.S. Treasury Department Form 941.

d. "Minority" includes:

(i) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);

(ii) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);

(iii) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and

(iv) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

2. Whenever the Contractor, or any Subcontractor at any tier, subcontracts a portion of the work involving any construction trade, it shall physically include in each subcontract in excess of $10,000 the provisions of these specifications and the Notice which contains the applicable goals for minority and female participation and which is set forth in the solicitations from which this contract resulted.

3. If the Contractor is participating (pursuant to 41 CFR 60-4.5) in a Hometown Plan approved by the U.S. Department of Labor in the covered area either individually or through an association, its affirmative action obligations on all work in the Plan area (including goals and timetables) shall be in accordance with that Plan for those trades which have unions participating in the Plan. Contractors must be able to demonstrate their participation in and compliance with the provisions of any such Hometown Plan. Each Contractor or Subcontractor participating in an approved Plan is individually required to comply with its obligations under the EEO clause, and to make a good faith effort to achieve each goal under the Plan in each trade in which it has employees. The overall good faith performance by other Contractors or Subcontractors toward a goal in an approved Plan does not excuse any covered Contractor's or Subcontractor's failure to take good faith efforts to achieve the Plan goals and timetables.

4. The Contractor shall implement the specific affirmative action standards provided in paragraphs 7 a through p of these specifications. The goals set forth in the solicitation from which this contract resulted are expressed as percentages of the total hours of employment and training of minority and female utilization the Contractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. Covered Construction contractors performing construction work in geographical areas where they do not have a Federal or federally assisted constuction contract shall apply the minority and female goals established for the geographical area where the work is being performed. Goals are published periodically in the FEDERAL REGISTER in notice form, and such notices may be obtained from any Office of Federal Contract Compliance Programs office or from Federal procurement contracting officers. The Contractor is expected to make substantially uniform progress in meeting its goals in each craft during the period specified.

5. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the Contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the Contractor's obligations under these specifications, Executive Order 11246, or the regulations promulgated pursuant thereto.

6. In order for the nonworking training hours of apprentices and trainees to be counted in meeting the goals, such apprentices and trainees must be employed by the Contractor during the training period, and the Contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U.S. Department of Labor.

7. The Contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:

a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor's employees are assigned to work. The Contractor, where possible, will assign two or more women to each construction project. The Contractor shall

specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.

b. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.

c. Maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the Contractor, this shall be documented in the file with the reason therefor, along with whatever additional actions the Contractor may have taken.

d. Provide immediate written notification to the Director when the union or unions with which the Contractor has a collective bargaining agreement has not referred to the Contractor a minority person or woman sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.

e. Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under 7b above.

f. Disseminate the Contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newpaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.

g. Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions including specific review of these items with onsite supervisory personnel such as Superintendents, General Foremen, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.

h. Disseminate the Contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the Contractor's EEO policy with other Contractors and Subcontractors with whom the Contractor does or anticipates doing business.

i. Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority and female recruitment and training organizations serving the Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.

j. Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of a Contractor's work force.

k. Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR Part 60-3.

l. Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.

m. Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Contractor's obligations under these specifications are being carried out.

n. Ensure that all facilities and company activities are nonsegregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.

o. Document and maintain a record of all solicitations of offers for subcontracts from

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minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

p. Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations.

8. Contractors are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations (7a through p). The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under 7a through p of these Specifications provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the Contractor's minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's and failure of such a group to fulfill an obligation shall not be a defense for the Contractor's noncompliance.

9. A single goal for minorities and a separate single goal for women have been established. The Contractor, however, is required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and non-minority. Consequently, the Contractor may be in violation of the Executive Order if a particular group is employed in a substantially disparate manner (for example, even though the Contractor has achieved its goals for women generally, the Contractor may be in violation of the Executive Order if a specific minority group of women is underutilized).

10. The Contractor shall not use the goals and timetables or affirmative action standards to discriminate against any person because of race, color, religion, sex, or national origin.

11. The Contractor shall not enter into any Subcontract with any person or firm debarred from Government contracts pursuant to Executive Order 11246.

12. The Contractor shall carry out such sanctions and penalties for violation of these specifications and of the Equal Opportunity Clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementing regulations, by the Office of Federal Contract Compliance Programs. Any Contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Executive Order 11246, as amended.

13. The Contractor, in fulfilling its obligations under these specifications, shall implement specific affirmative action steps, at least as extensive as those standards prescribed in paragraph 7 of these specifications, so as to achieve maximum results from its efforts to ensure equal employment opportunity. If the Contractor fails to comply with the requirements of the Executive Order, the implementing regulations, or these specifications, the Director shall proceed in accordance with 41 CFR 60-4.8.

14. The Contractor shall designate a responsible official to monitor all employment related activity to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the Government and to keep records. Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors shall not be required to maintain separate records.

15. Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

(b) The notice set forth in 41 CFR 60-4.2 and the specifications set forth in 41 CFR 60-4.3 replace the New Form for Federal Equal Employment Opportunity Bid Conditions for Federal and Federally Assisted Construction published at 41 FR 32482 and commonly known as the Model Federal EEO Bid Conditions, and the New Form shall not be used after the regulations in 41 CFR Part 60-4 become effective.

[43 FR 49254, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978, as amended at 45 FR 65978, Oct. 3, 1980]

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§ 60-4.4 Affirmative action requirements.

(a) To implement the affirmative action requirements of Executive Order 11246 in the construction industry, the Office of Federal Contract Compliance Programs previously has approved affirmative action programs commonly referred to as "Hometown Plans," has promulgated affirmative action plans referred to as "Imposed Plans" and has approved "Special Bid Conditions" for high impact projects constructed in areas not covered by a Hometown or an Imposed Plan. All solicitations for construction contracts made after the effective date of the regulations in this part shall include the notice specified in § 60-4.2 of this part and the specifications in § 60-4.3 of this part in lieu of the Hometown and Imposed Plans including the Philadelphia Plan and Special Bid Conditions. Until the Director has issued an order pursuant to § 60-4.6 of this part establishing goals and timetables for minorities in the appropriate geographical areas or for a project covered by Special Bid Conditions, the goals and timetables for minorities to be inserted in the Notice required by 41 CFR 60-4.2 shall be the goals and timetables contained in the Hometown Plan, Imposed Plan or Special Bid Conditions presently covering the respective geographical area or project involved.

(b) Signatories to a Hometown Plan (including heavy highway affirmative action plans) shall have 45 days from the effective date of the regulations in this part to submit under such a Plan (for the director's approval) goals and timetables for women and to include female representation on the Hometown Plan Administrative Committee. Such goals for female representation shall be at least as high as the goals established for female representation in the notice issued pursuant to 41 CFR 60-4.6. Failure of the signatories, within the 45-day period, to include female representation and to submit goals for women or a new plan, as appropriate, shall result in an automatic termination of the Office of Federal Contract Compliance Program's approval of the Hometown Plan. At any time the Office of Federal Contract Compliance Programs terminates or withdraws its approval of a Hometown Plan, or when the plan expires and another plan is not approved, the contractors signatory to the plan shall be covered automatically by the specifications set forth in § 60-4.3 of this part and by the goals and timetables established for that geographical area pursuant to § 60-4.6 of this part.

§ 60-4.5 Hometown plans.

(a) A contractor participating, either individually or through an association, in an approved Hometown Plan (including heavy highway affirmative action plans) shall comply with its affirmative action obligations under Executive Order 11246 by complying with its obligations under the plan: *Provided,* That each contractor or subcontractor participating in an approved plan is individually required to comply with the equal opportunity clause set forth in 41 CFR 60-1.4; to make a good faith effort to achieve the goals for each trade participating in the plan in which it has employees; and that the overall good performance by other contractors or subcontractors toward a goal in an approved plan does not excuse any covered contractor's or subcontractor's failure to take good faith efforts to achieve the plan's goals and timetables. If a contractor is not participating in an approved Hometown Plan it shall comply with the specifications set forth in § 60-4.3 of this part and with the goals and timetables for the appropriate area as listed in the notice required by 41 CFR 60-4.2 with regard to that trade. For the purposes of this part 60-4, a contractor is not participating in a Hometown Plan for a particular trade if it:

(1) Ceases to be signatory to a Hometown Plan covering that trade;

(2) Is signatory to a Hometown Plan for that trade but is not party to a collective bargaining agreement for that trade;

(3) Is signatory to a Hometown Plan for that trade but is party to a collective bargaining agreement with labor organizations which are not or cease to be signatories to the same Hometown Plan for that trade;

(4) Is signatory to a Hometown Plan for that trade but is party to a collec-

tive bargaining agreement with a labor organization for that trade but the two have not jointly executed a specific commitment to minority and female goals and timetables and incorporated the commitment in the Hometown Plan for that trade;

(5) is participating in a Hometown Plan for that trade which is no longer acceptable to the Office of Federal Contract Compliance Programs;

(6) Is signatory to a Hometown Plan for that trade but is party to a collective bargaining agreement with a labor organization for that trade and the labor organization and the contractor have failed to make a good faith effort to comply with their obligations under the Hometown Plan for that trade.

(b) Contractors participating in Hometown Plans must be able to demonstrate their participation and document their compliance with the provision of the Hometown Plan.

[43 FR 49254, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-4.6 Goals and timetables.

The Director, from time to time, shall issue goals and timetables for minority and female utilization which shall be based on appropriate workforce, demographic or other relevant data and which shall cover construction projects or construction contracts performed in specific geographical areas. The goals, which shall be applicable to each construction trade in a covered contractor's or subcontractor's entire workforce which is working in the area covered by the goals and timetables, shall be published as notices in the FEDERAL REGISTER, and shall be inserted by the contracting officers and applicants, as applicable, in the Notice required by 41 CFR 60-4.2. Covered construction contractors performing construction work in geographical areas where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the work is being performed.

[45 FR 65978, Oct. 3, 1980]

§ 60-4.7 Effect on other regulations.

The regulations in this part are in addition to the regulations contained in this chapter which apply to construction contractors and subcontractors generally. See particularly, 41 CFR 60-1.4 (a), (b), (c), (d), and (e); 60-1.5; 60-1.7; 60-1.8; 60-1.26; 60-1.29; 60-1.30; 60-1.32; 60-1.41; 60-1.42; 60-1.43; and 41 CFR Part 60-3; Part 60-20; Part 60-30; Part 60-40; and Part 60-50.

§ 60-4.8 Show cause notice.

If an investigation or compliance review reveals that a construction contractor or subcontractor has violated the Executive order, any contract clause, specifications or the regulations in this chapter and if administrative enforcement is contemplated, the Director shall issue to the contractor or subcontractor a notice to show cause which shall contain the items specified in paragraphs (i) through (iv) of 41 CFR 60-2.2(c)(1). If the contractor does not show good cause within 30 days, or in the alternative, fails to enter an acceptable conciliation agreement which includes where appropriate, make up goals and timetables, back pay, and seniority relief for affected class members, the OFCCP shall follow the procedure in 41 CFR 60-1.26(b): *Provided*, That where a conciliation agreement has been violated, no show cause notice is required prior to the initiation of enforcement proceedings.

[43 FR 49254, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-4.9 Incorporation by operation of the order.

By operation of the order, the equal opportunity clause contained in § 60-1.4, the Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity (Executive Order 11246) contained in § 60-4.2, and the Standard Federal Equal Employment Opportunity Construction Contract Specifications (Executive Order 11246) contained in § 60-4.3 shall be deemed to be a part of every solicitation or of every contract and subcontract, as appropriate, required by the order and the regulations in this chap-

ter to include such clauses whether or not they are physically incorporated in such solicitation or contract and whether or not the contract is written.

PART 60-20—SEX DISCRIMINATION GUIDELINES

Sec.

60-20.1 Title and purpose.
60-20.2 Recruitment and advertisement.
60-20.3 Job policies and practices.
60-20.4 Seniority system.
60-20.5 Discriminatory wages.
60-20.6 Affirmative actions.

AUTHORITY. Sec. 201, E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303, as amended by E.O. 12086.

SOURCE: 43 FR 49258, Oct. 20, 1978, unless otherwise noted.

OMB CONTROL No.: 1215-0072. (47 FR 14696, Apr. 6, 1982)

§ 60-20.1 Title and purpose.

The purpose of the provisions in this part is to set forth the interpretations and guidelines of the Office of Federal Contract Compliance Programs regarding the implementation of Executive Order 11246, as amended for the promotion and insuring of equal opportunities for all persons employed or seeking employment with Government contractors and subcontractors or with contractors and subcontractors performing under federally assisted construction contracts, without regard to sex. Experience has indicated that special problems related to the implementation of the Executive Order require a definitive treatment beyond the terms of the order itself. These interpretations are to be read in connection with existing regulations, set forth in Part 60-1 of this chapter.

§ 60-20.2 Recruitment and advertisement.

(a) Employers engaged in recruiting activity must recruit employees of both sexes for all jobs unless sex is a bona fide occupation qualification.

(b) Advertisement in newspapers and other media for employment must not express a sex preference unless sex is a bona fide occupational qualification for the job. The placement of an advertisement in columns headed "Male" or "Female" will be considered an expression of a preference, limitation, specification, or discrimination based on sex.

§ 60-20.3 Job policies and practices.

(a) Written personnel policies relating to this subject area must expressly indicate that there shall be no discrimination against employees on account of sex. If the employer deals with a bargaining representative for his employees and there is a written agreement on conditions of employment, such agreement shall not be inconsistent with these guidelines.

(b) Employees of both sexes shall have an equal opportunity to any available job that he or she is qualified to perform, unless sex is a bona fide occupational qualification.

NOTE: In most Government contract work there are only limited instances where valid reasons can be expected to exist which would justify the exclusion of all men or all women from any given job.

(c) The employer must not make any distinction based upon sex in employment opportunities, wages, hours, or other conditions of employment. In the area of employer contributions for insurance, pensions, welfare programs and other similar "fringe benefits" the employer will not be considered to have violated these guidelines if his contributions are the same for men and women or if the resulting benefits are equal.

(d) Any distinction between married and unmarried persons of one sex that is not made between married and unmarried persons of the opposite sex will be considered to be a distinction made on the basis of sex. Similarly, an employer must not deny employment to women with young children unless it has the same exclusionary policies for men; or terminate an employee of one sex in a particular job classification upon reaching a certain age unless the same rule is applicable to members of the opposite sex.

(e) The employer's policies and practices must assure appropriate physical facilities to both sexes. The employer may not refuse to hire men or women, or deny men or women a particular job because there are no restroom or associated facilities, unless the employer is able to show that the construction of

the facilities would be unreasonable for such reasons as excessive expense or lack of space.

(f)(1) An employer must not deny a female employee the right to any job that she is qualified to perform in reliance upon a State "protective" law. For example, such laws include those which prohibit women from performing in certain types of occupations (e.g., a bartender or a core-maker); from working at jobs requiring more than a certain number of hours; and from working at jobs that require lifting or carrying more than designated weights.

(2) Such legislation was intended to be beneficial, but, instead, has been found to result in restricting employment opportunities for men and/or women. Accordingly, it cannot be used as a basis for denying employment or for establishing sex as a bona fide occupational qualification for the job.

(g)(1) Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female employee meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing. The conditions applicable to her leave (other than the length thereof) and to her return to employment, shall be in accordance with the employer's leave policy.

(2) If the employer has no leave policy, childbearing must be considered by the employer to be a justification for a leave of absence for a female employee for a reasonable period of time. Following childbirth, and upon signifying her intent to return within a reasonable time, such female employee shall be reinstated to her original job or to a position of like status and pay, without loss of service credits.

(h) The employer must not specify any differences for male and female employees on the basis of sex in either mandatory or optional retirement age.

(i) Nothing in these guidelines shall be interpreted to mean that differences in capabilities for job assignments do not exist among individuals and that such distinctions may not be recognized by the employer in making specific assignments. The purpose of these guidelines is to insure that such distinctions are not based upon sex.

§ 60-20.4 Seniority system.

Where they exist, seniority lines and lists must not be based solely upon sex. Where such a separation has existed, the employer must eliminate this distinction.

§ 60-20.5 Discriminatory wages.

(a) The employer's wages schedules must not be related to or based on the sex of the employees.

NOTE: The more obvious cases of discrimination exist where employees of different sexes are paid different wages on jobs which require substantially equal skill, effort and responsibility and are performed under similar working conditions.

(b) The employer may not discriminatorily restrict one sex to certain job classifications. In such a situation, the employer must take steps to make jobs available to all qualified employees in all classifications without regard to sex. (Example: An electrical manufacturing company may have a production division with three functional units: One (assembly) all female; another (wiring), all male; and a third (circuit boards), also all male. The highest wage attainable in the assembly unit is considerably less than that in the circuit board and wiring units. In such a case the employer must take steps to provide qualified female employees opportunity for placement in job openings in the other two units.)

(c) To avoid overlapping and conflicting administration the Director will consult with the Administrator of the Wage and Hour Administration before issuing an opinion on any matter covered by both the Equal Pay Act and Executive Order 11246, as amended.

§ 60-20.6 Affirmative action.

(a) The employer shall take affirmative action to recruit women to apply for those jobs where they have been previously excluded.

NOTE: This can be done by various methods. Examples include: (1) Including in itineraries of recruiting trips women's colleges where graduates with skills desired by the employer can be found, and female students of coeducational institutions and (2) designing advertisements to indicate that women will be considered equally with men for jobs.

(b) Women have not been typically found in significant numbers in management. In many companies management trainee programs are one of the ladders to management positions. Traditionally, few, if any, women have been admitted into these programs. An important element of affirmative action shall be a commitment to include women candidates in such programs.

(c) Distinctions based on sex may not be made in other training programs. Both sexes should have equal access to all training programs and affirmative action programs should require a demonstration by the employer that such access has been provided.

PART 60-30—RULES OF PRACTICE FOR ADMINISTRATIVE PROCEEDINGS TO ENFORCE EQUAL OPPORTUNITY UNDER EXECUTIVE ORDER 11246

GENERAL PROVISIONS

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60-30.36 Exceptions to recommendations.
60-30.37 Final Administrative Order.

AUTHORITY: Secs. 201, 205, 208, 209, 301, 302(b) and 303(a) of the Executive Order 11246, as amended, 30 FR 12319; 32 FR 14303; sec. 60-1.26 of this chapter (41 CFR Part 60-1), as amended by E.O. 12086, unless otherwise noted.

SOURCE: 43 FR 49259, Oct. 20, 1978, unless otherwise noted.

OMB CONTROL No.: 1215-0072. (47 FR 14696, Apr. 6, 1982)

GENERAL PROVISIONS

§ 60-30.1 Applicability of rules.

This part provides the rules of practice for all administrative proceedings, instituted by the OFCCP including but not limited to proceedings instituted against construction contractors or subcontractors, which relate to the enforcement of equal opportunity under Executive Order 11246, as amended. In

the absence of a specific provision, procedures shall be in accordance with the Federal Rules of Civil Procedure.

§ 60-30.2 Waiver, modification.

Upon notice to all parties, the Administrative Law Judge may, with respect to matters pending before him modify or waive any rule herein upon a determination that no party will be prejudiced and that the ends of justice will be served thereby.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-30.3 Computation of time.

In computing any period of time under these rules or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government in which event it includes the next business day.

§ 60-30.4 Form, filing, service of pleadings and papers.

(a) *Form.* The original of all pleadings and papers in a proceeding conducted under the regulations in this part shall be filed with the Administrative Law Judge assigned to the case or with the Chief Administrative Law Judge if the case has not been assigned. Every pleading and paper filed in the proceeding shall contain a caption setting forth the name of the agency instituting the proceeding, the title of the action, the case file number assigned by the Administrative Law Judge, and a designation of the pleading or paper (e.g., complaint, motion to dismiss, etc.). The pleading or papers shall be signed and shall contain the address and telephone number of the person representing the party or the person on whose behalf the pleading or paper was filed. Unless otherwise ordered for good cause by the Administrative Law Judge regarding specific papers and pleadings in a specific case, all such papers and pleadings are public documents.

(b) *Service.* Service upon any party shall be made by the party filing the pleading or document by delivering a copy or mailing a copy to the party's last known address. When a party is represented by an attorney, the service shall by upon the attorney.

(c) *Proof of service.* A certificate of the person serving the pleading or other document by personal delivery or by mailing, setting forth the manner of services shall be proof of the service.

Prehearing Procedures

§ 60-30.5 Administrative complaint.

(a) *Filing.* The Solicitor of Labor, Associate Solicitor for Labor Relations and Civil Rights Regional Solicitors and Regional Attorney upon referral from the Office of Federal Contract Compliance Programs, are authorized to institute enforcement proceedings by filing a complaint and serving the complaint upon the contractor which shall be designated as the defendant. The Department of Labor, OFCCP, as shall be designated on plaintiff.

(b) *Contents.* The complaint shall contain a concise jurisdictional statement, and a clear and concise statement sufficient to put the defendant on notice of the acts or practices it is alleged to have committed in violation of the Order, the regulations, or its contractual obligations. The complaint shall also contain a prayer regarding the relief being sought, a statement of whatever sanctions the Government will seek to impose and the name and address of the attorney who will represent the Government.

(c) *Amendment.* The complaint may be amended once as a matter of course before an answer is filed, and the defendant may amend its answer once as a matter of course not later than 10 days after the filing of the original answer. Other amendments of the complaint or of the answer to the complaint shall be made only by leave of the Administrative Law Judge or by written consent of the adverse party; and leave shall be freely given where justice so requires. An amended complaint shall be answered within 14 days of its service, or within the time for filing an answer to the original complaint, whichever period is longer. An amended answer shall be responded to within 14 days of its service.

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(E.O. 11246 as amended; sec. 503 of Rehabilitation Act of 1973 as amended; sec. 402 of Vietnam Era Veterans Readjustment Assistance Act of 1974)

[43 FR 49259, Oct. 20, 1978, as amended at 44 FR 49691, Aug. 24, 1979]

§ 60-30.6 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint, the defendant shall file an answer with the Chief Administrative Law Judge if the case has not been assigned to an Administrative Law Judge. The answer shall be signed by the defendant or its attorney, and served on the Government in accordance with § 60-30.4(b).

(b) *Contents; failure to file.* The answer shall (1) contain a statement of the facts which constitute the grounds of defense, and shall specifically admit, explain, or deny, each of the allegations of the complaint unless the defendant is without knowledge, in which case the answer shall so state; or (2) state that the defendant admits all the allegations of the complaint. The answer may contain a waiver of hearing; and if not, a separate paragraph in the answer shall request a hearing. The answer shall contain the name and address of the defendant, or of the attorney representing the defendant. Failure to file an answer or to plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

(c) *Procedure, upon admission of facts.* The admission, in the answer or by failure to file an answer, of all the material allegations of fact contained in the complaint shall constitute a waiver of hearing. Upon such admission, the Administrative Law Judge, without further hearing, may prepare his decision in which he shall adopt as his proposed findings of fact the material facts alleged in the complaint. The parties shall be given an opportunity to file exceptions to his decision and to file briefs in support of the exceptions.

§ 60-30.7 Notice of prehearing conference.

The Administrative Law Judge shall respond to defendant's request for a hearing within 15 days and shall serve a notice of prehearing conference on the parties. The notice shall contain the time and place of the conference.

§ 60-30.8 Motions; disposition of motions.

(a) *Motions.* Motions shall state the relief sought, the authority relied upon and the facts alleged, and shall be filed with the Administrative Law Judge. If made before or after the hearing itself, the motions shall be in writing. If made at the hearing, motions may be stated orally; but the Administrative Law Judge may require that they be reduced to writing and filed and served on all parties in the same manner as a formal motion. Unless otherwise ordered by the Administrative Law Judge, written motions shall be accompanied by a supporting memorandum. Within 10 days after a written motion is served, or such other time period as may be fixed, any party may file a response to a motion.

(b) *Disposition of motions.* The Administrative Law Judge may not grant a written motion prior to expiration of the time for filing responses thereto, except upon consent of the parties or following a hearing, but may overrule or deny such motion without awaiting response: *Provided,* That prehearing conferences, hearings, and decisions need not be delayed pending disposition of motions.

§ 60-30.9 Interrogatories, and admissions as to facts and documents.

(a) *Interrogatories.* Not later than 25 days prior to the date of the hearing, except for good cause shown, or not later than 14 days prior to such earlier date as the Administrative Law Judge may order, any party may serve upon an opposing party written interrogatories. Each interrogatory shall be answered separately and fully in writing under oath, unless objected to. Answers are to be signed by the person making them and objections by the attorney or by whoever is representing the party. Answers and objections shall be filed and served within 25 days of service of the interrogatory.

(b) *Admissions.* Not later than 14 days prior to the date of the hearing, except for good cause shown, or not later than 14 days prior to such earlier

date as the Administrative Law Judge may order, any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters as to which an admission is requested shall be deemed admitted, unless within 25 days after service, the party to whom the request is directed serves upon the requesting party a sworn statement either (1) denying specifically the matter as to which an admission is requested, or (2) setting forth in detail the reasons why he cannot truthfully either admit or deny such matters.

(c) *Objections or failures to respond.* The party submitting the interrogatory or request may move for an order with respect to any objection or other failure to respond.

§ 60-30.10 Production of documents and things and entry upon land for inspection and other purposes.

(a) After commencement of the action, any party may serve on any other party a request to produce and/or permit the party, or someone acting on his behalf, to inspect and copy any unprivileged documents, phonorecords, and other compilations, including computer tapes and printouts which contain or may lead to relevant information and which are in the possession, custody, or control of the party upon whom the request is served. If necessary, translation of data compilations shall be done by the party furnishing the information.

(b) After commencement of the action, any party may serve on any other party a request to permit entry upon designated property which may be relevant to the issues in the proceeding and, which is in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying or photographing, testing, or sampling the property or any designated object or area.

(c) Each request shall set forth with reasonable particularity the items to be inspected and shall specify a reasonable time and place for making the inspection and performing the related acts.

(d) The party upon whom the request is served shall respond within 25 days after the service of the request. The response shall state, with respect to each item, that inspection and related activities will be permitted as requested, unless there are objections, in which case the reasons for each objection shall be stated. The party submitting the request may move for an order with respect to any objection or to other failure to respond.

§ 60-30.11 Depositions upon oral examination.

(a) *Depositions; notice of examination.* After commencement of the action, any party may take the testimony of any person, including a party, having personal or expert knowledge of the matters in issue, by deposition upon oral examination. A party desiring to take a deposition shall give reasonable notice in writing to every other party to the proceeding, and may use an administrative subpoena. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. The notice shall also set forth the categories of documents the witness is to bring with him to the deposition, if any. A copy of the notice shall be furnished to the person to be examined unless his name is unknown.

(b) *Production of witnesses; obligation of parties; objections.* It shall be the obligation of each party to produce for examination any person, along with such documents as may be requested, at the time and place, and on the date, set forth in the notice, if that party has control over such person. Each party shall be deemed to have control over its officers, agents, employees, and members. Unless the parties agree otherwise, depositions shall be held within the county in which the witness resides or works. The party or prospective witness may file with the Administrative Law

Judge an objection within 5 days after notice of production of such witness is served, stating with particularity the reasons why the party cannot or ought not to produce a requested witness. The party serving the notice may move for an order with respect to such objection or failure to produce a witness. All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(c) *Before whom taken; scope of examination; failure to answer.* Depositions may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the deposition is held. At the time and place specified in the notice, each party shall be permitted to examine and cross-examine the witness under oath upon any matter which is relevant to the subject matter of the proceeding, or which is reasonably calculated to lead to the production of relevant and otherwise admissible evidence. All objections to questions, except as to the form thereof, and all objections to evidence are reserved until the hearing. A refusal or failure on the part of any person under the control of a party to answer a question shall operate to create a presumption that the answer, if given, would be unfavorable to the controlling party, unless the question is subsequently ruled improper by the Administrative Law Judge or the Administrative Law Judge rules that there was valid justification for the witness' failure or refusal to answer the question: *Provided,* That the examining party shall note on the record during the deposition the question which the deponent has failed, or refused to answer, and state his intention to invoke the presumption if no answer is forthcoming.

(d) *Subscription; certification; filing.* The testimony shall be reduced to typewriting, either by the officer taking the deposition or under his direction, and shall be submitted to the witness for examination and signing. If the deposition is not signed by the witness because he is ill, dead, cannot be found, or refuses to sign it, such fact shall be noted in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver the original copy of the transcript, together with his certificate, in person or by mail to the Administrative Law Judge. Copies of the transcript and certificate shall be furnished to all persons desiring them, upon payment of reasonable charges, unless distribution is restricted by order of the Administrative Law Judge for good cause shown.

(e) *Rulings on admissibility; use of deposition.* Subject to the provisions of this section, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying. Any part or all of a deposition, so far as admissible in the discretion of the Administrative Law Judge, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice, in accordance with the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent, or was designated to testify on behalf of a public or private corporation, partnership, association, or governmental agency which is a party may be used by the adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the administrative law judge finds: (i) That the witness is dead; or (ii) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (iii) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (iv) upon application and notice, that such exceptional circumstances exist as to

make it desirable to allow the deposition to be used.

(4) If only part of a deposition is introduced in evidence by a party, any party may introduce any other parts by way of rebuttal and otherwise.

(f) *Stipulations.* If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-30.12 Prehearing conferences.

(a) Upon his own motion or the motion of the parties, the Administrative Law Judge may direct the parties or their counsel to meet with him for a conference to consider:

(1) Simplification of the issues;

(2) Necessity or desirability of amendments to pleadings for purposes of clarification, simplification, or limitation;

(3) Stipulations, admissions of fact and of contents and authenticity of documents;

(4) Limitation of number of witnesses;

(5) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(6) Such other matters as may tend to expedite the disposition of the proceedings.

(b) The record shall show the matters disposed of by order and by agreement in such pretrial conferences. The subsequent course of the proceeding shall be controlled by such action.

§ 60-30.13 Consent findings and order.

(a) *General.* At any time after the issuance of a complaint and prior to or during the reception of evidence in any proceeding, the parties may jointly move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be in the discretion of the Administrative Law Judge after consideration of the nature of the proceeding, the requirments of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the complaint and the agreement;

(3) That any further procedural steps are waived; and

(4) That any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement is waived.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their counsel may:

(1) Submit the proposed agreement to the Administrative Law Judge for his consideration;

(2) Inform the Administrative Law Judge that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed, the Administrative Law Judge, within 30 days, shall accept such agreement by issuing his decision based upon the agreed findings, and his decision shall consititute the final Administrative order.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

Hearings and Related Matters

§ 60-30.14 Designation of Administrative Law Judges.

Hearings shall be held before an Administrative Law Judge of the Department of Labor who shall be designated by the Chief Administrative Law Judge of the Department of Labor. After commencement of the proceeding but prior to the designation of an Administrative Law Judge, pleadings and papers shall be filed with the Chief Administrative Law Judge.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-30.15 Authority and responsibilities of Administrative Law Judges.

The Administrative Law Judge shall propose findings and conclusions to the Secretary on the basis of the record. In order to do so, he shall have the duty to conduct a fair hearing, to take all necesssary action to avoid delay, and to maintain order. He shall have all powers necessary to those ends, including, but not limited to, the power to:

(a) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding by consent of the parties or upon his own motion;

(b) Require parties to state their position with respect to the various issues in the proceeding;

(c) Require parties to produce for examination those relevant witnesses and documents under their control; and require parties to answer interrogatories and requests for admissions in full;

(d) Administer oaths;

(e) Rule on motions, and other procedural items or matters pending before him;

(f) Regulate the course of the hearing and conduct of participants therein;

(g) Examine and cross-examine witnesses, and introduce into the record documentary or other evidence;

(h) Receive, rule on, exclude, or limit evidence and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;

(i) Fix time limits for submission of written documents in matters before him and extend any time limits established by this part upon a determination that no party will be prejudiced and that the ends of justice will be served thereby;

(j) Impose appropriate sanctions against any party or person failing to obey an order under these rules which may include:

(1) Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting it from introducing designated matters in evidence;

(2) Excluding all testimony of an unresponsive or evasive witness, or determining that the answer of such witness, if given, would be unfavorable to the party having control over him; and

(3) Expelling any party or person from further participation in the hearing;

(k) Take official notice of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice;

(l) Recommend whether the respondent is in current violation of the order, regulations, or its contractual obligations, as well as the nature of the relief necessary to insure the full enjoyment of the rights secured by the order;

(m) Issue subpoenas; and

(n) Take any action authorized by these rules.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-30.16 Appearances.

(a) *Representation.* The parties or other persons or organizations participating pursuant to this part 60-30 have the right to be represented by counsel.

(b) *Failure to appear.* In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present shall have an election to present his evidence in whole or such portion thereof sufficient to make a prima facie case before the Administrative Law Judge. Failure to appear at the hearing shall not be deemed to be a waiver of the right to be served with a copy of the Administrative Law Judge's recommended decision and to file exceptions to it.

§ 60-30.17 Appearance of witnesses.

(a) A party wishing to procure the appearance at the hearing of any person having personal or expert knowledge of the matters in issue shall serve on the prospective witness a notice, which may be accomplished by an administrative subpoena, setting forth the time, date, and place at which he is to appear for the purpose

of giving testimony. The notice shall also set forth the categories of documents the witness is to bring with him to the hearing, if any. A copy of the notice shall be filed with the Administrative Law Judge and additional copies shall be served upon the opposing parties.

(b) It shall be the obligation of each party to produce for examination any person, along with such documents as may be requested, at the time and place, and on the date, set forth in the notice, if that party has control over such person. Each party shall be deemed to have control over its officers, agents, employees, and members. Due regard shall be given to the convenience of witnesses in scheduling their testimony so that they will be detained no longer than reasonably necessary.

(c) The party or prospective witness may file an objection within 5 days after notice of production of such witness is served stating with particularity the reasons why the party cannot produce a requested witness. The party serving the notice may move for an order with respect to such objection or failure to produce a witness.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-30.18 Evidence; testimony.

Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence available shall be applied. Testimony shall be given orally by witnesses at the hearing. A witness shall be available for cross-examination, and, at the descretion of the Administrative Law Judge, may be cross-examined without regard to the scope of direct examination as to any matter which is relevant and material to the proceeding. The Administrative Law Judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious.

§ 60-30.19 Objections; exceptions; offer of proof.

(a) *Objections.* If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination or the failure to limit such scope, he shall state briefly the grounds for such objection. Rulings on all objections shall appear in the record. Only objections made on the record may be relied upon subsequently in the proceedings.

(b) *Exceptions.* Formal exception to an adverse ruling is not required. Rulings by the Administrative Law Judge shall not be appealed prior to the transfer of the case to the Secretary, but shall be considered by the Secretary upon filing exceptions to the Administrative Law Judge's recommendations and conclusions.

(c) *Offer of proof.* An offer of proof made in connection with an objection taken to any ruling excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in written form or consists of reference to documents, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-30.20 Ex parte communications.

The Administrative Law Judge shall not consult any person, or party, on any fact in issue unless upon notice and opportunity for all parties to participate. No employee or agent of the Federal Government engaged in the investigation and prosecution of this case shall participate or advise in the rendering of the recommended or final decision in the case, except as witness or counsel in the proceeding.

§ 60-30.21 Oral argument.

Any party shall be entitled upon request to a reasonable period between the close of evidence and termination of the hearing for oral argument. Oral arguments shall be included in the official transcript of the hearing.

§ 60-30.22 Official transcript.

The official transcripts of testimony taken, together with any exhibits, briefs, or memorandums of law, shall be filed with the Administrative Law Judge. Transcripts of testimony may

be obtained from the official reporter by the parties and the public as provided in section 11(a) of the Federal Advisory Committee Act (86 Stat. 770). Upon notice to all parties, the Administrative Law Judge may authorize such corrections to the transcript as are necessary to reflect accurately the testimony.

§ 60-30.23 Summary judgment.

(a) *For the Government.* At any time after the expiration of 20 days from the commencement of the action, or after service of a motion for summary judgment by the respondent, the Government may move with or without supporting affidavits for a summary judgment upon all claims or any part.

(b) *For defendant.* The defendant may, at any time after commencement of the action, move with or without supporting affidavits for summary judgment in its favor as to all claims or any part.

(c) *Other parties.* Any other party to a formal proceeding under this part may support or oppose motions for summary judgment made by the Government or respondent, in accordance with this section, but may not move for a summary judgment in his own behalf.

(d) *Statement of uncontested facts.* All motions for summary judgment shall be accompanied by a "Statement of Uncontested Facts" in which the moving party sets forth all alleged uncontested material facts which shall provide the basis for its motion. At least 5 days prior to the time fixed for hearing on the motion, any party contending that any material fact regarding the matter covered by the motion is in dispute, shall file a "Statement of Disputed Facts." Failure to file a "Statement of Disputed Facts" shall be deemed as an admission to the "Statement of Uncontested Facts."

(e) *Motion and proceedings.* The motion shall be served upon all parties at least 15 days before the time fixed for the hearing on the motion. The adverse party or parties may serve opposing affidavits prior to the day of hearing. The judgment sought shall be rendered forthwith if the complaint and answer, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Summary judgment rendered for or against the Government or the respondent shall constitute the findings and recommendations on the issues involved. Hearings on motions made under this section shall be scheduled by the Administrative Law Judge.

(f) *Case not fully adjudicated on motion.* If on motion under this section judgment is not rendered upon the whole case or for all the relief asked and a final hearing is necessary, the Administrative Law Judge at the hearing of the motion, by examining the notice and answer and the evidence before him and by interrogating counsel, shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. He shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which relief is not in controversy, and directing such further proceedings as are just. At the hearing on the merits, the facts so specified shall be deemed established, and the final hearing shall be conducted accordingly.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-30.24 Participation by interested persons.

(a)(1) To the extent that proceedings hereunder involve employment of persons covered by a collective bargaining agreement, and compliance may necessitate a revision of such agreement, any labor organization which is a signatory to the agreement shall have the right to participate as a party.

(2) Other persons or organizations shall have the right to participate as parties if the final Administrative Order could adversely affect them or the class they represent, and such participation may contribute materially to the proper disposition of the proceedings.

(3) Any person or organization wishing to participate as a party under this

section shall file with the Administrative Law Judge and serve on all parties a petition within 25 days after the commencement of the action or at such other time as ordered by the Administrative Law Judge, so long as it does not disrupt the proceeding. Such petition shall concisely state: (i) Petitioner's interest in the proceedings; (ii) who will appear for petitioner; (iii) the issues on which petitioner wishes to participate; and (iv) whether petitioner intends to present witnesses.

(4) The Administrative Law Judge shall determine whether each petitioner has the requisite interest in the proceedings and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interest, the Administrative Law Judge may request all such petitioners to designate a single representative to represent all such petitioners: *Provided,* That the representative of a labor organization qualifying to participate under paragraph (a)(1) of the section must be permitted to participate in the proceedings. The Administrative Law Judge shall give each petitioner written notice of the decision on his petition; and if the petition is denied, he shall briefly state the grounds for denial and shall then treat the petition as a request for participation as amicus curiae. The Administrative Law Judge shall give written notice to each party of each petition granted.

(b)(1) Any other interested person or organization wishing to participate as amicus curiae shall file a petition before the commencement of the final hearing with the Administrative Law Judge. Such petition shall concisely state: (i) The petitioner's interest in the hearing; (ii) who will represent the petitioner; and (iii) the issues on which petitioner intends to present argument. The Administrative Law Judge may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, and that such participation may contribute materially to the proper disposition of the issues. An amicus curiae is not a party but may participate as provided in this section.

(2) An amicus curiae may present a brief oral statement at the hearing at the point in the proceeding specified by the Administrative Law Judge. He may submit a written statement of position to the Administrative Law Judge prior to the beginning of a hearing and shall serve a copy on each party. He may also submit a brief or written statement at such time as the parties submit briefs and exceptions, and he shall serve a copy on each party.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

Post-Hearing Procedures

§ 60-30.25 Proposed findings of fact and conclusions of law.

Within 20 days after receipt of the transcript of the testimony, each party and amicus may file a brief. Such briefs shall be served simultaneously on all parties and amici, and a certificate of service shall be furnished to the Administrative Law Judge. Requests for additional time in which to file a brief shall be made in writing, and copies shall be served simultaneously on the other parties. Requests for extensions shall be received not later than 3 days before the date such briefs are due. No reply brief may be filed except by special permission of the Administrative Law Judge.

§ 60-30.26 Record for recommended decision.

The transcript of testimony, exhibits, and all papers, documents, and requests filed in the proceedings, including briefs, but excepting the correspondence section of the docket, shall constitute the record for decision.

§ 60-30.27 Recommended decision.

Within a reasonable time after the filing of briefs, the Administrative Law Judge shall recommend findings, conclusions, and a decision. These recommendations shall be certified, together with the record for recommended decision to the Secretary of Labor for a final Administrative Order. The recommended findings, conclusions, and decision shall be

served on all parties and amici to the proceeding.

§ 60-30.28 Exceptions to recommended decisions.

Within 14 days after receipt of the recommended findings, conclusions, and decision, any party may submit exceptions to said recommendation. These exceptions may be responded to by other parties within 14 days of their receipt by said parties. All exceptions and responses shall be filed with the Secretary. Service of such briefs or exceptions and responses shall be made simultaneously on all parties to the proceeding. Requests to the Secretary for additional time in which to file exceptions and responses shall be in writing and copies shall be served simultaneously on other parties. Requests for extensions must be received no later than 3 days before the exceptions are due.

§ 60-30.29 Record.

After expiration of the time for filing briefs and exceptions, the Secretary shall make a final decision, which shall be the final Administrative Order, on the basis of the record. The record shall consist of the record for recommended decision, the rulings and recommended decision of the Administrative Law Judge and the exceptions and briefs filed subsequent to the Administrative Law Judge's decision.

§ 60-30.30 Final Administrative Order.

After expiration of the time for filing, the Secretary shall make a final Administrative Order which shall be served on all parties. If the Secretary concludes that the defendant has violated the Executive Order, the equal opportunity clause, or the regulations, an Administrative Order shall be issued enjoining the violations, and requiring the contractor to provide whatever remedies are appropriate, and imposing whatever sanctions are appropriate, or any of the above. In any event, failure to comply with the Administrative Order shall result in the immediate cancellation, termination and suspension of the respondent's contracts and/or debarment of the respondent from further contracts.

Expedited Hearing Procedures

Authority: Sections 60-30.31 to 60-30.37 issued under E.O. 11246 (30 FR 12319) as amended by E.O. 11375 and 12086.

Source: Sections 60-30.31 to 60-30.37 appeared at 44 FR 77003, Dec. 28, 1979, unless otherwise noted.

§ 60-30.31 Expedited hearings—when appropriate.

Expedited Hearings may be used, *inter alia*, when a contractor or subcontractor has violated a conciliation agreement; has not adopted and implemented an acceptable affirmative action program; has refused to give access to or to supply records or other information as required by the equal opportunity clause; or has refused to allow an on-site compliance review to be conducted.

§ 60-30.32 Administrative complaint and answer.

(a) Expedited hearings shall be commenced by filing an administrative complaint in accordance with 41 CFR 60-30.5. The complaint shall state that the hearing is subject to these expedited hearing procedures.

(b) The answer shall be filed in accordance with 41 CFR 60-30.6 (a) and (b).

(c) Failure to request a hearing within the 20 days provided by 41 CFR 60-30.6(a) shall constitute a waiver of hearing, and all the material allegations of fact contained in the complaint shall be deemed to be admitted. If a hearing is not requested or is waived, within 25 days of the complaint's filing, the Administrative Law Judge shall adopt as findings of fact the material facts alleged in the complaint, and shall order the appropriate sanctions and/or penalties sought in the complaint. The Administrative Law Judge's findings and order shall constitute a final Administrative Order, unless the Office of the Solicitor, U.S. Department of Labor, files exceptions to the findings and order within 10 days of receipt thereof. If the Office of the Solicitor, U.S. Department of Labor, files exceptions, the matter shall proceed in accordance with § 60-30.36 of this part.

(d) If a request for a hearing is received within 20 days as provided by 41 CFR 60-30.6(a), the hearing shall be convened within 45 days of receipt of the request and shall be completed within 15 days thereafter, unless more hearing time is required.

§ 60-30.33 Discovery.

(a) Any party may serve requests for admissions in accordance with § 60-30.9 (b) and (c).

(b) Witness lists and hearing exhibits will be exchanged at least 10 days in advance of the hearing.

(c) For good cause shown, and upon motion made in accordance with § 60-30.8, the Administrative Law Judge may allow the taking of depositions. Other discovery will not be permitted.

§ 60-30.34 Conduct of hearing.

(a) At the hearing, the Government shall be given an opportunity to demonstrate the basis for the request for sanctions and/or remedies, and the contractor shall be given an opportunity to show that the violation complained of did not occur and/or that good cause or good faith efforts excuse the alleged violations. Both parties shall be allowed to present evidence and argument and to cross-examine witnesses.

(b) The hearing shall be informal in nature, and the Administrative Law Judge shall not be bound by formal rules of evidence.

§ 60-30.35 Recommended decision after hearing.

Within 15 days after the hearing is concluded, the Administrative Law Judge shall recommend findings, conclusions, and a decision. The Administrative Law Judge may permit the parties to file written post-hearing briefs within this time period, but the Administrative Law Judge's recommendations shall not be delayed pending receipt of such briefs. These recommendations shall be certified, together with the record, to the Secretary for a final Administrative Order. The recommended decision shall be served on all parties and amici to the proceeding.

§ 60-30.36 Exceptions to recommendations.

Within 10 days after receipt of the recommended findings, conclusions and decision, any party may submit exceptions to said recommendations. Exceptions may be responded to by other parties within 7 days after receipt by said parties of the exceptions. All exceptions and responses shall be filed with the Secretary. Briefs or exceptions and responses shall be filed with the Secretary. Briefs or exceptions and responses shall be served simultaneously on all parties to the proceeding.

§ 60-30.37 Final Administrative Order.

(a) After expiration of the time for filing exceptions, the Secretary shall issue a final Administrative Order which shall be served on all parties. Unless the Secretary issues a final Administrative Order within 30 days after the expiration of the time for filing exceptions, the Administrative Law Judge's recommended decision shall become a final Administrative Order which shall become effective on the 31st day after expiration of the time for filing exceptions. Except as to specific time periods required in this subsection, 41 CFR 60-30.30 shall be applicable to this subsection.

PART 60-40—EXAMINATION AND COPYING OF OFCCP DOCUMENTS

Subpart A—General

Sec.

60-40.1 Purpose and scope.
60-40.2 Information available on request.
60-40.3 Information exempt from compulsory disclosure and which may be withheld.
60-40.4 Information disclosure of which is prohibited by law.

Subpart B—Procedures for Disclosure

60-40.5 Applicability of procedures.
60-40.6 To whom to direct requests.
60-40.7 Partial disclosure.
60-40.8 Facilities and procedures for disclosure.

AUTHORITY: Executive Order 11246, as amended by Executive Order 11375, and as amended by Executive Order 12086; 5 U.S.C. 552.

BEST DOCUMENT AVAILABLE

SOURCE: 43 FR 49264, Oct. 20, 1978, unless otherwise noted.

OMB CONTROL NO.: 1215-0072. (47 FR 14696, Apr. 6, 1982)

Subpart A—General

§ 60-40.1 Purpose and scope.

This part contains the general rules of the OFCCP providing for public access to information from records of the OFCCP or its various compliance agencies. These regulations implement 5 U.S.C. 552, the Freedom of Information Act and supplement the policy and regulations of the Department of Labor, 29 CFR Part 70. It is the policy of the OFCCP to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment. This part sets forth generally the categories of records accessible to the public, the types of records subject to prohibitions or restrictions on disclosure, and the places at which and the procedures whereby members of the public may obtain access to and inspect and copy information from records in the custody of the OFCCP.

[43 FR 49264, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-40.2 Information available on request.

(a) Upon the request of any person for identifiable records obtained or generated pursuant to Executive Order 11246 (as amended) such records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 U.S.C. 552 subsection (b), if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCCP, except in the case of records disclosure of which is prohibited by law.

(b) Consistent with the above, all contract compliance documents within the custody of the OFCCP shall be disclosed upon request unless specifically prohibited by law or as limited elsewhere herein. The types of documents which if in the custody of the OFCCP must be disclosed include, but are not limited to, the following:

(1) Affirmative action plans, whether or not reviewed and finally accepted by the OFCCP except as limited in 41 CFR 60-40.3(a)(1).

(2) Imposed plans and hometown plans, pending or approved.

(3) Text of final conciliation agreements.

(4) Validation studies of tests or other preemployment selection methods.

(5) Dates and times of scheduled compliance reviews.

§ 60-40.3 Information exempt from compulsory disclosure and which may be withheld.

(a) The following documents or parts thereof are exempt from mandatory disclosure by the OFCCP, and should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCCP.

(1) Those portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public. A determination to withhold this type of information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

(2) Those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee.

(3) The names of individual complainants.

(4) The assignments to particular contractors of named compliance officers if such disclosure would subject

the named compliance officers to undue harassment or would affect the efficient enforcement of the Executive order.

(5) Compliance investigation files including the standard compliance review report and related documents, during the course of the review to which they pertain or while enforcement action against the contractor is in progress or contemplated within a reasonable time. Therefore, these reports and related files shall not be disclosed only to the extent that information contained therein constitutes trade secrets and confidential commercial or financial information, interagency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, data which would be exempt from mandatory disclosure pursuant to the "informants privilege" or such information the disclosure of which is prohibited by statute.

(6) Copies of preemployment selection tests used by contractors.

(b) Other records may be withheld consistent with the Freedom of Information Act on a case-by-case basis, with the prior approval of the Director, OFCCP.

§ 60-40.4 Information disclosure of which is prohibited by law.

The Standard Form 100 (EEO-1) which is submitted by contractors to the OFCCP or a Joint Reporting Committee servicing both the OFCCP and the EEOC shall be disclosed pending further instructions from the Director. The statutory prohibition on disclosure set forth in section 709(e) of the Civil Rights Act of 1964 is limited by the terms of that section to information obtained pursuant to the authority of title VII of that Act and its disclosure by employees of the EEOC.

Subpart B—Procedures for Disclosure

§ 60-40.5 Applicability of procedures.

Requests for the inspection and copying of information from records in the custody of the OFCCP which are identifiable and available under the provisions of Subpart A of this part shall be made and acted upon as provided in the following sections of this subpart. Officers and employees of the OFCCP are authorized by the Director to continue to furnish to the public, informally and without compliance with these procedures, information and copies from its records which prior to the enactment of the Freedom of Information Act (5 U.S.C. 552) were customarily furnished in the regular performance of their duties.

[43 FR 49264, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-40.6 To whom to direct requests.

A request for contract compliance records or information shall be directed to the National OFCCP or appropriate OFCCP Regional or Area Office. If the person making the request does not know in which office the record is located, he may direct his request to the Director, Office of Federal Contract Compliance Programs, Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210, for appropriate handling.

§ 60-40.7 Partial disclosure.

If a requested record contains some materials which are protected from disclosure and other materials which are not so protected, identifying details or protected matters shall be deleted wherever analysis indicates that such deletions are feasible. Whenever such deletions are made, the remainder of the records may be disclosed.

§ 60-40.8 Facilities and procedures for disclosure.

(a) [Reserved]

(b) Procedures relating to the avaliability of records shall be governed by the Department of Labor regulations, 29 CFR 70.35 to 70.64.

PART 60-50—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION OR NATIONAL ORIGIN

Sec.

60-50.1 Purpose and scope.
60-50.2 Equal employment policy.

BEST DOCUMENT AVAILABLE

Sec.

60-50.3 Accommodations to religious observance and practice.
60-50.4 Enforcement.
60-50.5 Nondiscrimination.

AUTHORITY: Sec. 201, E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303, as amended by E.O. 12086.

SOURCE: 43 FR 49265, Oct. 20, 1978, unless otherwise amended.

OMB CONTROL NO.: 1215-0072. (47 FR 14696, Apr. 6, 1982)

§ 60-50.1 Purpose and scope.

(a) The purpose of the provisions in this part is to set forth the interpretations and guidelines of the Office of Federal Contract Compliance Programs regarding the implementation of Executive Order 11246, as amended, for promoting and insuring equal employment opportunities for all persons employed or seeking employment with Government contractors and subcontractors or with contractors and subcontractors performing under federally assisted construction contracts, without regard to religion or national origin.

(b) Members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin. These guidelines are intended to remedy such unfair treatment.

(c) These guidelines are also intended to clarify the obligations of employers with respect to accommodating to the religious observances and practices of employees and prospective employees.

(d) The employment problems of blacks, Spanish-surnamed Americans, orientals, and American Indians are treated under Part 60-2 of this chapter and under other regulations and procedures implementing the requirements of Executive Order 11246, as amended. Accordingly, the remedial provisions of § 60-50.2(b) shall not be applicable to the employment problems of these groups.

(e) Nothing contained in this Part 60-50 is intended to supersede or otherwise limit the exemption set forth in § 60-1.5(a)(5) of this chapter for contracts with certain educational institutions.

§ 60-50.2 Equal employment policy.

(a) *General requirements.* Under the equal opportunity clause contained in section 202 of Executive Order 11246, as amended, employers are prohibited from discriminating against employees or applicants for employment because of religion or national origin, and must take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their religion or national origin. Such action includes, but is not limited to the following: Employment, upgrading, demotion, or transfer: Recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

(b) *Outreach and positive recruitment.* Employers shall review their employment practices to determine whether members of the various religious and/or ethnic groups are receiving fair consideration for job opportunities. Special attention shall be directed toward executive and middle-management levels, where employment problems relating to religion and national origin are most likely to occur. Based upon the findings of such reviews, employers shall undertake appropriate outreach and positive recruitment activities, such as those listed below, in order to remedy existing deficiencies. It is not contemplated that employers necessarily will undertake all of the listed activities. The scope of the employer's efforts shall depend upon all the circumstances, including the nature and extent of the employer's deficiencies and the employer's size and resources.

(1) Internal communication of the employer's obligation to provide equal employment opportunity without regard to religion or national origin in such a manner as to foster understanding, acceptance, and support among the employer's executive, management, supervisory, and all other employees and to encourage such per-

sons to take the necessary action to aid the employer in meeting this obligation.

(2) Development of reasonable internal procedures to insure that the employer's obligation to provide equal employment opportunity without regard to religion or national origin is being fully implemented.

(3) Periodically informing all employees of the employer's commitment to equal employment opportunity for all persons, without regard to religion or national origin.

(4) Enlisting the assistance and support of all recruitment sources (including employment agencies, college placement directors, and business associates) for the employer's commitment to provide equal employment opportunity without regard to religion or national origin.

(5) Reviewing employment records to determine the availability of promotable and transferable members of various religious and ethnic groups.

(6) Establishment of meaningful contacts with religious and ethnic organizations and leaders for such purposes as advice, education, technical assistance, and referral of potential employees.

(7) Engaging in significant recruitment activities at educational institutions with substantial enrollments of students from various religious and ethnic groups.

(8) Use of the religious and ethnic media for institutional and employment advertising.

§ 60-50.3 Accommodations to religious observance and practice.

An employer must accommodate to the religious observances and practices of an employee or prospective employee unless the employer demonstrates that it is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. As part of this obligation, an employer must make reasonable accommodations to the religious observances and practices of an employee or prospective employee who regularly observes Friday evening and Saturday, or some other day of the week, as his Sabbath and/or who observes certain religious holidays during the year and who is conscientiously opposed to performing work or engaging in similar activity on such days, when such accommodations can be made without undue hardship on the conduct of the employer's business. In determining the extent of an employer's obligations under this section, at least the following factors shall be considered: (a) Business necessity, (b) financial costs and expenses, and (c) resulting personnel problems.

§ 60-50.4 Enforcement.

The provisions of this part are subject to the general enforcement, compliance review, and complaint procedures set forth in Subpart B of Part 60-1 of this chapter.

§ 60-50.5 Nondiscrimination.

The provisions of this part are not intended and shall not be used to discriminate against any qualified employee or applicant for employment because of race, color, religion, sex, or national origin.

PART 60-60—CONTRACTOR EVALUATION PROCEDURES FOR CONTRACTORS FOR SUPPLIES AND SERVICES

Subpart A—General

Sec.
60-60.1 Purpose and scope.
60-60.2 Background.

Subpart B—Procedures for Contractor Evaluation

60-60.3 Agency actions.

Subpart C—Disclosure and Review of Contractor Data

60-60.4 Confidentiality and relevancy of information.
60-60.5 Employee interviews.
60-60.6 Exit conference.
60-60.7 Time schedule for completion.
60-60.8 Supersedure.

AUTHORITY: 5 U.S.C. 553(a)(3)(B), 29 CFR 2.7; sec. 201, E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303, as amended by E.O. 12086.

SOURCE: 43 FR 49266, Oct. 20, 1978, unless otherwise noted.

BEST DOCUMENT AVAILABLE

OMB CONTROL NO.: 1215-0072. (47 FR 14696, Apr. 6, 1982)

Subpart A—General

§ 60-60.1 Purpose and scope.

This part shall be known as "Revised Order No. 14" and is intended to establish standardized contractor evaluation procedures for conducting compliance reviews of contractors for supplies and services subject to the Equal Employment Opportunity Requirements of 41 CFR 60-1.40 and 41 CFR Part 60-2 (Revised Order No. 4) for the development of written affirmative action programs.

§ 60-60.2 Background.

(a) Each prime contractor or subcontractor with 50 or more employees and a contract of $50,000 or more is required to develop a written affirmative action program for each of its establishments (§ 60-1.40 of this chapter). If a contractor fails to submit an affirmative action program and supporting documents, including the workforce analysis within 30 days of a request therefor, the enforcement procedures specified in OFCCP Order No. 4 (§ 60-2.2(c) of this chapter) shall be applicable.

(b) Required affirmative action programs must contain a utilization analysis and goals and timetables as required in §§ 60-2.11 and 60-2.12 of this chapter.

[43 FR 49266, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

Subpart B—Procedures for Contractor Evaluation

§ 60-60.3 Agency actions.

(a) *Basic steps.* A contractor evaluation should proceed as follows:

(1) A desk audit of the contractor's affirmative action program with special attention directed to the included workforce analysis, using the format set forth in the Standard Compliance Review Report,

(2) An on-site review of those matters which still are not fully or satisfactorily addressed in the affirmative action program and workforce analysis, using the format set forth in the Standard Compliance Review Report and

(3) Where necessary, an off-site analysis of information supplied by the contractor during or pursuant to the on-site review. Contractors may reach agreement with OFCCP on nationwide AAP formats or on frequency of updating statistics.

(b) *Desk Audit.* Using its approved methods of priority selection, OFCCP shall routinely request from among the Federal contractors within their jurisdiction affirmative action programs and supporting documentation, including the workforce analysis and support data for audit. As used throughout this part, the term "Affirmative Action Program (AAP) and supporting documentation" means the Required Contents of Affirmative Action Programs, as set forth in Subpart B of 41 CFR Part 60-2 and Methods of Implementing the Requirements of Subpart B, set forth in Subpart C of 41 CFR Part 60-2. "Workforce analysis" is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job groups) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges. For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed.

(1) *Exceptions to the desk audit requirements.* For preaward reviews and for complaint investigations, the desk audit need not be carried out or an abbreviated desk audit may be performed and an immediate on-site review performed. Special reports that meet the criteria in paragraph (b)(1) of this section may be requested from contractors, as required, for submission to the OFCCP for complaint investigations and follow-up reviews performed within 1 year of a full compliance review. The Director may approve other special compliance reviews when the circumstances require an immediate on-site review.

(c) *On-site review.* If upon selection of an AAP and included workforce analysis for desk audit, the OFCCP finds that the material submitted does not demonstrate a reasonable effort by the contractor to meet all the requirements of Subparts B and C of Order No. 4 (Part 60-2 of this chapter) the on-site review need not be carried out and the enforcement procedures specified in Order 4 shall be applicable. Otherwise following a desk audit of the affirmative action program and supporting documentation the OFCCP will schedule an on-site review of the establishment, provided, that an on-site review need not be carried out when OFCCP can determine that the contractor's affirmative action program is acceptable. This determination must be based on the current desk audit and an on-site review conducted within the preceding 24 months and also must include an affirmative determination that the circumstances of the previous on-site review have not substantially changed.

(1) OFCCP is to request from those contractors scheduled for on-site reviews that information necessary to perform the review be made available on-site. Specifically, this includes (i) information necessary to conduct an indepth analysis of apparent deficiencies in the contractors utilization of women or minorities, (ii) information required for a complete and thorough understanding of data contained in or offered as support for the affirmative action program, and (iii) information concerning matters relevant to a determination of compliance with the requirements of Executive Order 11246 (as amended), but not adequately addressed in the affirmative action program. However, the contractor should be requested to furnish only the specific items of information which the compliance officer determines are:

(*a*) Necessary for conducting the review and completing the standard compliance review report, and

(*b*) Not contained in or able to be derived from the material submitted by the contractor.

(2) In order to pursue certain issues uncovered in the compliance review, it may be necessary for the compliance officer to request certain additional information on-site even though such data have not been previously identified. Such additonal information must also meet the above criteria.

(d) *Off-site analysis.* Where necessary, the compliance officer may take information made available during the on-site review off-site for further analysis. An off-site analysis should be conducted where issues have arisen concerning deficiencies or an apparent violation which, in the judgment of the compliance officer, should be more thoroughly analyzed off-site before a determination of compliance is made.

[43 FR 49266, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

Subpart C—Disclosure and Review of Contractor Data

§ 60-60.4 Confidentiality and relevancy of information.

(a) *Desk audit data.* If the contractor is concerned with the confidentiality of such information as lists of employees, employee names, reasons for termination and pay data then alphabetic or numeric coding or the use of an index of pay and pay ranges are acceptable for desk audit purposes.

(b) *On-site data.* The contractor must provide full access to all relevant data on-site as required by § 60-1.43 of this chapter.

(c) *Data required for off-site analysis.* The contractor must provide all data determined by the compliance officer to be necessary for off-site analysis pursuant to § 60-60.3(c) above. Such data may only be coded if the

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contractor makes the code available to the compliance officer. If the contractor believes that particular information which is to be taken off-site is not relevant to compliance with the Executive Order, the contractor may request a ruling by the OFCCP Area Director. The OFCCP Area Director shall issue a ruling within 10 days. The contractor may appeal that ruling to the OFCCP Assistant Regional Administrator within 10 days. The Assistant Regional Administrator shall issue a final ruling within 10 days. Pending a final ruling, the information in question must be made available to the compliance officer off-site, but shall be considered a part of the investigatory file and subject to the provisions of paragraph (d) of this section. The agency shall take all necessary precautions to safeguard all confidentiality of such information until a final determination is made. Such information may not be copied and access to the information shall be limited to the compliance officer and personnel involved in the determination of relevancy. Data determined to be not relevant to the investigation will be returned to the contractor immediately.

(d) *Public access to information.* Information obtained from a contractor under Subpart B will be subject to the public inspection and copying provisions of the Freedom of Information Act, 5 U.S.C. 552. Contractors should identify any information which they believe is not subject to disclosure under 5 U.S.C. 552, and should specify the reasons why such information is not disclosable. The OFCCP Assistant Regional Administrator will consider the contractor's claim and make a determination, within 10 days, as to whether the material in question is exempt from disclosure. The OFCCP Assistant Regional Administrator will inform the contractor of such a determination. The contractor may appeal that ruling to the Director of OFCCP within 10 days. The Director of OFCCP shall make a final determination within 10 days of the filing of the appeal. However, during the conduct of a compliance review or while enforcement action against the contractor is in progress or contemplated within a reasonable time, all information obtained from a contractor under Subpart B except information disclosable under §§ 60-40.2 and 60-40.3 of this chapter is to be considered part of an investigatory file compiled for law enforcement purposes within the meaning of 5 U.S.C. 552(b)(7), and such information obtained from a contractor under Subpart B shall be treated as exempt from mandatory disclosure under the Freedom of Information Act during the compliance review.

(e) *Examination and copying of documents.* Nothing contained herein is intended to supersede or otherwise limit the provisions contained in Part 60-40 of this chapter for public access to information from records of the OFCC or its various compliance agencies.

[43 FR 49266, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-60.5 Employee interviews.

The compliance officer should contact, where appropriate, a reasonable number of employees for interviews as part of the on-site review of the contractors' employment practices. The number, scope and manner of conducting such interviews should be discussed in advance with the contractor.

§ 60-60.6 Exit conference.

(a) Upon completion of the on-site review (and off-site analysis, if one is undertaken) the compliance officer should schedule an exit conference with contractor officials to review the findings of the review. This exit conference should itemize the apparent violations that lend themselves to immediate correction, and solicit the contractor's agreement to take adequate corrective action by specified dates. The contractor's commitments should be contained in a written conciliation agreement signed at the exit conference. However, in cases where the apparent deficiencies require further analysis subsequent to the on-site review, the compliance officer will advise the contractor of the areas of concern, secure the data necessary to his ultimate compliance determination, complete the review later by notifying the contractor in writing of all apparent violations found, and obtain

the contractor's commitments in a written conciliation agreement to correct such deficiencies.

(b) The contractor may at any time avail himself of the provisions of § 60-1.24(c)(4) of this chapter which provides as follows:

(1) When a prime contractor or subcontractor, without a hearing, shall have complied with the recommendations or orders of the Director and believes such recommendations or orders to be erroneous, he shall, upon filing a request therefor within 10 days of such compliance, be afforded an opportunity for a hearing and review of the alleged erroneous action.

§ 60-60.7 Time schedule for completion.

(a) With the exception of extensions of time granted by the Director of OFCCP for good cause shown, within 60 days from the date the affirmative action program including the workforce analysis is received, the contractor must have been found in compliance and notified of that fact, or must have been issued a 30-day show cause notice as required under the rules and regulations pursuant to the Executive Order.

(b) During this period the compliance officer shall:

(1) Complete the desk audit.

(2) Schedule the on-site review.

(3) Complete the on-site review.

(4) Complete the off-site analysis, if conducted.

(5) Give notice of compliance or issue show cause notice.

(c) Failure to give the contractor a notice of compliance or issue a show cause notice within the time period set forth in paragraph (a) shall not be deemed a finding of compliance or acceptance of the contractor's affirmative action program.

[43 FR 49266, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60-60.8 Supersedure.

The requirements of this Part 60-60 supersede the prior version of Revised Order No. 14 published at 38 FR 13376, May 21, 1973.

PART 60-250—AFFIRMATIVE ACTION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS FOR DISABLED VETERANS AND VETERANS OF THE VIETNAM ERA

Subpart A—Preliminary Matters, Affirmative Action Clause, Compliance

Sec.
60-250.1 Purpose and application.
60-250.2 Definitions.
60-250.3 Coverage and waivers.
60-250.4 Affirmative action clause.
60-250.5 Applicability of the affirmative action program requirement.
60-250.6 Affirmative action policy, practices and procedures.
60-250.7 Determination of disability.
60-250.8 [Reserved]
60-250.9 Labor unions and recruiting and training agencies.

Subpart B—General Enforcement and Complaint Procedure

60-250.20 Subcontracts.
60-250.21 Adaptation of language.
60-250.22 Incorporation by reference.
60-250.23 Incorporation by operation of the Act and agency regulations.
60-250.24 Duties of agencies.
60-250.25 Evaluations by the Director.
60-250.26 Complaint procedures.
60-250.27 Noncompliance with the affirmative action clause.
60-250.28 Actions for noncompliance.
60-250.29 Formal hearings.
60-250.30 Notification of agencies.
60-250.31 Contractor ineligibility list.
60-250.32 Disputed matters related to the affirmative action program.
60-250.33 Responsibilities of State employment services.

Subpart C—Ancillary Matters

60-250.50 Reinstatement of ineligible contractors and subcontractors.
60-250.51 Intimidation and interference.
60-250.52 Recordkeeping.
60-250.53 Access to records of employment.
60-250.54 Rulings and interpretations.

APPENDIX A
APPENDIX B

AUTHORITY: Sec. 503(a), Pub. L. 92-540, 86 Stat. 1097 (38 U.S.C. 2012), as amended by Sec. 402, Pub. L. 93-508, 88 Stat. 1593 (38 U.S.C. 2012), unless otherwise noted.

SOURCE: 43 FR 49268, Oct. 20, 1978, unless otherwise noted.

OMB CONTROL NO.: 1215-0072. (47 FR 14696, Apr. 6, 1982)

Subpart A—Preliminary Matters, Affirmative Action Clause, Compliance

§ 60-250.1 Purpose and application.

The purpose of the regulations in this part is to assure compliance with section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974, which requires government contractors and subcontractors to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era. The regulations in this part apply to all government contracts and subcontracts for the furnishing of supplies or services or for the use of real or personal property (including construction) for $10,000 or more.

§ 60-250.2 Definitions.

"Act" means the Vietnam Era Veterans Readjustment Assistance Act of 1974, Pub. L. 93-508, as it amends 38 U.S.C. 2012, the Vietnam Era Veterans Readjustment Assistance Act of 1972.

"Affirmative action clause" means the contract provisions set forth in § 60-250.4.

"Agency" means any contracting agency of the government.

"Assistant Secretary" means the Assistant Secretary of Labor for Employment Standards or his or her designee.

"Construction" means the construction, rehabilitation, alteration, conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.

"Contract" means any government contract.

"Contracting agency" means any department, agency, establishment or instrumentality of the United States, including any wholly owned Government corporation, which enters into contracts.

"Contractor" means, unless otherwise indicated, a prime contractor or subcontractor.

"Director" means the Director of the Office of Federal Contract Compliance Programs of the United States Department of Labor or his/her designee.

"Disabled veteran" means a person entitled to disability compensation under laws administered by the Veterans Administration for disability rated at 30 per centum or more, or a person whose discharge or release from active duty was for a disability incurred or aggravated in the line of duty.

"Government" means the Government of the United States of America.

"Government contract" means any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property including lease arrangements. The term "services", as used in this section includes, but is not limited to the following services: Utility, construction, transportation, research, insurance, and fund depository, irrespective of whether the government is the purchaser or seller. The term "government contract" does not include (1) agreements in which the parties stand in the relationship of employer and employee, and (2) federally assisted contracts.

"Modification" means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

"Person" means any natural person, corporation, partnership or joint venture, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

"Prime contractor" means any person holding a contract, and, for the purposes of subpart B of this part, includes any person who has held a contract subject to the Act.

"Qualified disabled veteran" means a disabled veteran as defined in § 60-250.2 who is capable of performing a particular job, with reasonable accommodation to his or her disability.

"Recruiting and training agency" means any person who refers workers to any contractor or subcontractor, or who provides or supervises apprenticeship or training for employment by any contractor or subcontractor.

"Rules, regulations, and relevant orders of the Secretary of Labor" as used in paragraph (i) of the affirma-

tive action clause means rules, regulations, and relevant orders of the Secretary of Labor or his or her designee issued pursuant to the Act.

"Secretary" means the Secretary of Labor, U.S. Department of Labor.

"Subcontract" means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.

"Subcontractor" means any person holding a subcontract and, for the purpose of subpart B of this part, any person who has held a subcontract subject to the Act.

"United States" as used herein shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, the Panama Canal Zone, American Samoa and the Trust Territory of the Pacific Islands.

"Veteran of the Vietnam era" means a person (1) who (i) served on active duty for a period of more than 180 days, any part of which occurred between August 5, 1964 and May 7, 1975, and was discharged or released therefrom with other than a dishonorable discharge, or (ii) was discharged or released from active duty for a service-connected disability if any part of such active duty was performed between August 5, 1964 and May 7, 1975, and (2) who was so discharged or released within 48 months preceding the alleged violation of the Act, the affirmative action clause, and/or the regulations issued pursuant to the Act.

(E.O. 11246 (30 FR 12319) as amended by E.O. 11375 and 12086; sec. 503, Pub. L. 93-112, 87 Stat. 393 (29 U.S.C. 793), as amended by sec. 111, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706) and Executive Order 11758; sec. 503(a), Pub. L. 92-540, 86 Stat. 1097 (38 U.S.C. 2012), as amended by sec. 402, Pub. L. 93-508, 88 Stat. 1593 (38 U.S.C. 2012))

[43 FR 49268, Oct. 20, 1978; 43 FR 51402, Nov. 3, 1978; as amended at 45 FR 9272, Feb. 12, 1980]

§ 60-250.3 Coverage and waivers.

(a) *General.* (1) Transactions for less than $10,000. Contracts and subcontracts for less than $10,000 are not covered by the act. No agency, contractor or subcontractor shall procure supplies or services in less than usual quantities to avoid the applicability of the affirmative action clause.

(2) Contracts and subcontracts for indefinite quantities. With respect to indefinite delivery-type contracts and subcontracts (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, "call-type" contracts, and purchase notice agreements), the affirmative action clause shall be included unless the contracting agency has reason to believe that the amount to be ordered in any year under such contract will be less than $10,000. The applicability of the affirmative action clause shall be determined at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the affirmative action clause shall be applied to such contract whenever the amount of a single order is $10,000 or more. Once the affirmative action clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) Work outside the United States. The requirements of the affirmative action clause are waived with respect to contracts and subcontracts with regard to work performed outside the United States by employees who were not recruited within the United States.

(4) Contracts with State or local governments. The requirements of the affirmative action clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract.

(5) Facilities not connected with contracts. The Director may waive the requirements of the affirmative action clause with respect to any of a prime contractor's or subcontractor's facilities which he or she finds to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, provided that he or she also finds that such a waiver will not interfere with or impede the effectuation of the Act. Such waivers shall be considered only upon the request of the contractor or subcontractor.

(b) *Waivers*—(1) *Specific contracts and classes of contracts.* The head of an agency, with the concurrence of the Director, may waive the application to any contract or subcontract of any part of or all the affirmative action clause when he or she deems that special circumstances in the national interest so require. The agency head, with the concurrence of the Director, may also grant such waivers to groups or categories of contracts or subcontracts of the same type where it is (i) in the national interest, (ii) found impracticable to act upon each request individually, and (iii) where such waiver will substantially contribute to convenience in administration of the Act.

(2) *National security.* Any requirement set forth in the regulations in this Part shall not apply to any contract or subcontract whenever the head of the contracting agency determines that such contract or subcontract is essential to the national security and that its award without complying with such requirements is necessary to the national security. Upon making such a determination, the head of the agency will notify the Director in writing within 30 days.

(c) *Withdrawal of waiver.* When a waiver has been granted for any class of contracts or subcontracts under this section other than contracts granted waivers under paragraph (b)(2) of this section, the Director may withdraw the waiver for a specific contract or subcontract or group of contracts or subcontracts to be awarded, when in his or her judgment such action is necessary or appropriate to achieve the purposes of the Act. The withdrawal shall not apply to contracts or subcontracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

[43 FR 49268, Oct. 20, 1978; 43 FR 51402, Nov. 3, 1978]

§ 60-250.4 Affirmative action clause.

Each agency and each contractor and subcontractor shall include the following affirmative action clause in each of its covered government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract):

AFFIRMATIVE ACTION FOR DISABLED VETERANS AND VETERANS OF THE VIETNAM ERA

(a) The contractor will not discriminate against any employee or applicant for employment because he or she is a disabled veteran or veteran of the Vietnam era in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified disabled veterans and veterans of the Vietnam era without discrimination based upon their disability or veterans status in all employment practices such as the following: Employment upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(b) The contractor agrees that all suitable employment openings of the contractor which exist at the time of the execution of this contract and those which occur during the performance of this contract, including those not generated by this contract and including those occurring at an establishment of the contractor other than the one wherein the contract is being performed but excluding those of independently operated corporate affiliates, shall be listed at an appropriate local office of the State employment service system wherein the opening occurs. The contractor further agrees to provide such reports to such local office regarding employment openings and hires as may be required.

State and local government agencies holding Federal contracts of $10,000 or more

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shall also list all their suitable openings with the appropriate office of the State employment service, but are not required to provide those reports set forth in paragraphs (d) and (e).

(c) Listing of employment openings with the employment service system pursuant to this clause shall be made at least concurrently with the use of any other recruitment source or effort and shall involve the normal obligations which attach to the placing of a bona fide job order, including the acceptance of referrals of veterans and nonveterans. The listing of employment openings does not require the hiring of any particular job applicant or from any particular group of job applicants, and nothing herein is intended to relieve the contractor from any requirements in Executive Orders or regulations regarding nondiscrimination in employment.

(d) The reports required by paragraph (b) of this clause shall include, but not be limited to, periodic reports which shall be filed at least quarterly with the appropriate local office or, where the contractor has more than one hiring location in a State, with the central office of that State employment service. Such reports shall indicate for each hiring location (1) the number of individuals hired during the reporting period, (2) the number of nondisabled veterans of the Vietnam era hired, (3) the number of disabled veterans of the Vietnam era hired, and (4) the total number of disabled veterans hired. The reports should include covered veterans hired for on-the-job training under 38 U.S.C. 1787. The contractor shall submit a report within 30 days after the end of each reporting period wherein any performance is made on this contract identifying data for each hiring location. The contractor shall maintain at each hiring location copies of the reports submitted until the expiration of one year after final payment under the contract, during which time these reports and related documentation shall be made available, upon request, for examination by any authorized representatives of the contracting officer or of the Secretary of Labor. Documentation would include personnel records respecting job openings, recruitment and placement.

(e) Whenever the contractor becomes contractually bound to the listing provisions of this clause, it shall advise the employment service system in each State where it has establishments of the name and location of each hiring location in the State. As long as the contractor is contractually bound to these provisions and has so advised the State system, there is no need to advise the State system of subsequent contracts. The contractor may advise the State system when it is no longer bound by this contract clause.

(f) This clause does not apply to the listing of employment openings which occur and are filled outside of the 50 States, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

(g) The provisions of paragraphs (b), (c), (d), and (e) of this clause do not apply to openings which the contractor proposes to fill from within his own organization or to fill pursuant to a customary and traditional employer-union hiring arrangement. This exclusion does not apply to a particular opening once an employer decides to consider applicants outside of his own organization or employer-union arrangement for that opening.

(h) As used in this clause: (1) "All suitable employment openings" includes, but is not limited to, openings which occur in the following job categories: Production and nonproduction; plant and office; laborers and mechanics; supervisory and nonsupervisory; technical; and executive, administrative, and professional openings as are compensated on a salary basis of less than $25,000 per year. This term includes full-time employment, temporary employment of more than 3 days' duration, and part-time employment. It does not include openings which the contractor proposes to fill from within his own organization or to fill pursuant to a customary and traditional employer-union hiring arrangement nor openings in an educational institution which are restricted to students of that institution. Under the most compelling circumstances an employment opening may not be suitable for listing, including such situations where the needs of the Government cannot reasonably be otherwise supplied, where listing would be contrary to national security, or where the requirement of listing would otherwise not be for the best interest of the Government.

(2) "Appropriate office of the State employment service system" means the local office of the Federal-State national system of public employment offices with assigned responsibility for serving the area where the employment opening is to be filled, including the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

(3) "Openings which the contractor proposes to fill from within his own organization" means employment openings for which no consideration will be given to persons outside the contractor's organization (including any affiliates, subsidiaries, and the parent companies) and includes any openings which the contractor proposes to fill from regularly established "recall" lists.

(4) "Openings which the contractor proposes to fill pursuant to a customary and traditional employer-union hiring arrangement" means employment openings which the contractor proposes to fill from union halls, which is part of the customary and

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traditional hiring relationship which exists between the contractor and representatives of his employees.

(i) The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(j) In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(k) The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, provided by or through the contracting officer. Such notice shall state the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era for employment, and the rights of applicants and employees.

(l) The contractor will notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of the Vietnam Era Veterans Readjustment Assistance Act, and is committed to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era.

(m) The contractor will include the provisions of this clause in every subcontract or purchase order of $10,000 or more unless exempted by rules, regulations, or orders of the Secretary issued pursuant to the Act, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director of the Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

[43 FR 49268, Oct. 20, 1978; 43 FR 51402, Nov. 3, 1978]

EDITORIAL NOTE: At 47 FR 4258, Jan. 29, 1982, the effectiveness of paragraph (d) of § 60-250.4 was suspended. This suspension will remain in effect until the Department of Labor takes final action on the proposal to amend 41 CFR 60-250, published at 45 FR 86260, Dec. 30, 1980.

§ 60-250.5 Applicability of the affirmative action program requirement.

(a) Within 120 days of the commencement of a contract every Government contractor or subcontractor holding a contract of $50,000 or more and having 50 or more employees shall prepare and maintain an affirmative action program at each establishment which shall set forth the contractor's policies, practices and procedures in accordance with § 60-250.6 of this part. This program may be integrated into or kept separate from other affirmative action programs of the contractor. Contractors presently holding Government contracts shall update their affirmative action programs within 120 days of the effective date of this part.

(b) The affirmative action program shall be reviewed and updated annually. If there are any significant changes in procedures, rights or benefits as a result of the annual updating, those changes shall be communicated to employees and applicants for employment.

(c) The full affirmative action program shall be available for inspection to any employee or applicant for employment upon request. The location and hours during which the program may be obtained shall be posted at each facility.

(d) The contractor shall invite all disabled veterans and veterans of the Vietnam era who wish to benefit under the affirmative action program to identify themselves to the contractor. The invitation shall state that the information is voluntarily provided, that it will be kept confidential, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with the Act and regulations in this part. If an applicant or employee so identifies himself or herself, the contractor should also seek the advice of the applicant or employee regarding proper placement and appropriate accommodation (an acceptable form for such an invitation is set forth in appendix A attached). Nothing in this section shall preclude an employee from informing a contractor at a future time of his or her desire to benefit from this program. Nothing in this section shall relieve a contractor from liability for discrimination under the Act.

[43 FR 49268, Oct. 20, 1978; 43 FR 51402, Nov. 3, 1978]

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§ 60-250.6 Affirmative action policy, practices and procedures.

(a) *General requirements.* Under the affirmative action obligation imposed by the Vietnam Era Veterans Readjustment Assistance Act of 1974, contractors are required to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era at all levels of employment, including the executive level. Such action shall apply to all employment practices, including, but not limited to, the following: hiring, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship and on-the-job training programs under 38 U.S.C. 1787.

(b) *Proper consideration of qualifications.* Contractors shall review their personnel processes to determine whether their present procedures assure careful, thorough and systematic consideration of the job qualifications of known disabled veteran applicants and Vietnam era veteran applicants for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. In determining the qualifications of a covered veteran, the contractor shall consider only that portion of the military record, including discharge papers, relevant to the specific job qualifications for which the veteran is being considered. To the extent that it is necessary to modify their personnel procedures, contractors shall include the development of new procedures for this purpose in their affirmative action program required under this part. These procedures must be designed so as to facilitate a review of the implementation of this requirement by the contractor or the Government. (The appendix attached is an example of an appropriate set of procedures. The procedures in appendix B are not required and contractors may develop other procedures which are appropriate to their circumstances.)

(c) *Physical and mental qualifications.* (1) The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the review of all physical or mental job qualification requirements to insure that, to the extent qualification requirements tend to screen out qualified disabled veterans, they are job related and are consistent with business necessity and the safe performance of the job.

(2) Whenever a contractor applies physical or mental job qualification requirements in the selection of applicants or employees for employment or other change in employment status such as promotion, demotion, or training, to the extent that qualification requirements tend to screen out qualified disabled veterans, the requirements shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and the safe performance of the job. The contractor shall have the burden to demonstrate that it has complied with the requirements of this paragraph.

(3) Nothing in this section shall prohibit a contractor from conducting a comprehensive medical examination prior to employment provided that the results of such an examination shall be used only in accordance with the requirements of this section. Whenever a contractor inquires into an applicant's or employee's physical or mental condition or conducts a medical examination prior to employment or change in employment status information obtained in response to such inquiries or examination shall be kept confidential except that:

(i) Supervisors and managers may be informed regarding restrictions on the work or duties of disabled veterans and regarding accommodations; and

(ii) First aid and safety personnel may be informed, where and to the extent appropriate, if the condition might require emergency treatment; and

(iii) Government officials investigating compliance with the Act shall be informed.

(d) *Accommodation to physical and mental limitations of employees.* A contractor must make a reasonable accommodation to the physical and mental limitations of a disabled veteran unless the contractor can demonstrate that such an accommodation

would impose an undue hardship on the conduct of the contractor's business. In determining the extent of a contractor's accommodation obligations, the following factors among others may be considered: (1) Business necessity and (2) financial costs and expenses.

(e) *Compensation.* In offering employment or promotions to disabled veterans, and veterans of the Vietnam era, the contractor may not reduce the amount of compensation offered because of any disability income, pension or other benefit the applicant or employee receives from another source.

(f) *Outreach, positive recruitment, and external dissemination of policy.* Contractors shall review their employment practices to determine whether their personnel programs provide the required affirmative action for employment and advancement of qualified disabled veterans and veterans of the Vietnam era. Based upon the findings of such reviews, contractors shall undertake appropriate outreach and positive recruitment activities, such as those listed below. It is not contemplated that contractors will necessarily undertake all the listed activities or that their activities will be limited to those listed. The scope of a contractor's efforts shall depend upon all the circumstances, including the contractor's size and resources and the extent to which existing employment practices are adequate.

(1) The contractor should develop internal communication of its obligation to engage in affirmative action efforts to employ qualified disabled veterans and veterans of the Vietnam era in such a manner as to foster understanding, acceptance and support among the contractor's executive, management, supervisory and all other employeess and to encourage such persons to take the necessary action to aid the contractor in meeting this obligation.

(2) The contractor should develop reasonable internal procedures to ensure that its obligation to engage in affirmative action to employ and promote qualified disabled veterans and veterans of the Vietnam era is being fully implemented.

(3) The contractor should periodically inform all employees and prospective employees of its commitment to engage in affirmative action to increase employment opportunities for qualified disabled veterans and veterans of the Vietnam era.

(4) The contractor should enlist the assistance and support of all recruiting sources including as follows:

(i) The local Veterans Employment Representative or his or her designee in the State Employment Service Office nearest each establishment where hiring takes place to recruit job ready veterans and to develop on-the-job training opportunities for covered veterans wherever feasible;

(ii) The Veterans Administration Regional Office nearest each establishment to develop on-the-job training opportunities for covered veterans, and to recruit job ready veterans;

(iii) The office of the National Alliance of Businessmen nearest each establishment where hiring takes place in order to cooperate in the Jobs for Veterans' Program;

(iv) The veterans' counselors and coordinators ("Vet-Reps" and "VCIPS") on college campuses for the recruitment of covered veterans;

(v) The service officers of the national veterans groups active in the area of each establishment where hiring takes place for the recruitment of covered veterans; and

(vi) Local veterans' groups and veterans' service centers in the area of each establishment where employment services are performed near major cities, for the recruitment of covered veterans.

(5) The contractor should establish meaningful contacts with appropriate veterans' service organizations which service disabled veterans or veterans of the Vietnam era, for such purposes as advice, technical assistance and referral of potential employees. Technical assistance from the resources listed in this paragraph may consist of advice on proper placement, recruitment, training and accommodations contractors may undertake, but no such resource providing technical assistance shall have the authority to approve or disapprove the acceptability of affirmative action programs.

(6) The contractor should review employment records to determine the availability of promotable and transferrable qualified known disabled veterans and veterans of the Vietnam era presently employed, and to the determine whether their present and potential skills are being fully utilized or developed.

(7) The contractor should send written notification of company policy to all subcontractors, vendors and suppliers, requesting appropriate action on their part.

(8) The contractor should consider all qualified disabled veterans and veterans of the Vietnam era not currently in the workforce having requisite skills who can be recruited through affirmative action measures.

(g) *Internal dissemination of policy.* A strong outreach program will be ineffective without adequate internal support from supervisory and management personnel and other employees. In order to assure greater employee cooperation and participation in the contractor's efforts, the contractor should adopt, implement and disseminate this policy internally as follows:

(1) Include it in the contractor's policy manual.

(2) Publicize it in the company newspaper, magazine, annual report and other media.

(3) Conduct special meetings with executive, management, and supervisory personnel to explain the intent of the policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude.

(4) Schedule special meetings with all employees to discuss policy and explain individual employee responsibilities.

(5) Discuss the policy thoroughly in both employee orientation and management training programs.

(6) Meet with union officials to inform them of the contractor's policy, and request their cooperation.

(7) Include nondiscrimination clauses in all union agreements, and review all contractual provisions to insure they are nondiscriminatory.

(8) Include articles on accomplishments of disabled veterans and veterans of the Vietnam era in company publications.

(9) Post the policy on company bulletin boards, including a statement that employees and applicants are protected from coercion, intimidation, interference or discrimination for filing a complaint or assisting in an investigation under the Act.

(h) *Responsibility for implementation.* An executive of the contractor should be designated as director or manager of company affirmative action activities under these regulations. His or her identity should appear on all internal and external communications regarding the company's affirmative action programs. This executive should be given necessary top management support and staff to manage the implementation of this program, including the following activities:

(1) Develop policy statements, affirmative action programs, and internal and external communication techniques. The latter techniques should include regular discussions with local managers, supervisors and employees to be certain the contractor's policies are being followed. In addition, supervisors should be advised that:

(i) Their work performance is being evaluated on the basis of their affirmative action efforts and results, as well as other criteria.

(ii) The contractor is obligated to prevent harassment of employees placed through affirmative action efforts, as set forth in § 60-250.51.

(2) Identify problem areas in conjunction with line management and known disabled veterans, in the implementation of the affirmative action programs, and develop solutions. This is particularly important for the accommodations requirements.

(3) Design and implement audit and reporting systems that will:

(i) Measure effectiveness of the contractor's programs.

(ii) Indicate need for remedial action.

(iii) Determine the degree to which the contractor's objectives have been attained.

(iv) Determine whether known disabled veterans and veterans of the Vietnam era have had the opportunity

to participate in all company sponsored educational, training, recreational and social activities.

(v) Ensure that each location is in compliance with the Act and the regulations in this part.

(4) Serve as liaison between the contractor and enforcement agencies.

(5) Serve as liaison between the contractor and organizations of and for disabled veterans and veterans of the Vietnam era, and arrange for the active involvement by company representatives in the community service programs of local organizations of and for disabled veterans and veterans of the Vietnam era.

(6) Keep management informed of the latest developments in the entire affirmative action area.

(7) Arrange for career counseling for known disabled veterans and veterans of the Vietnam era.

(i) *Development and execution of affirmative action programs.* (1) Job qualification requirements reviewed pursuant to paragraph (c) of this section should be made available to all members of management involved in the recruitment, screening, selection, and promotion process.

(2) The contractor should evaluate the total selection process including training and promotion to insure freedom from stereotyping disabled veterans and veterans of the Vietnam era in a manner which limits their access to all jobs for which they are qualified.

(3) All personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes should be carefully selected and trained to insure that the commitments in its affirmative action program are implemented.

(4) Formal briefing sessions should be held, preferably on company premises, with representatives from recruiting sources. Plant tours, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefings. Formal arrangements should be made for referral of applicants, follow up with sources, and feedback on disposition of applicants.

(5) A special effort should be made to include qualified disabled veterans or veterans of the Vietnam era on the personnel relations staff.

(6) Active participation in veterans "job fairs" is desirable.

(7) Recruiting efforts at all educational institutions should incorporate special efforts to reach disabled veterans and veterans of the Vietnam era.

(8) An effort should be made to participate in workstudy programs with Veterans' Administration rehabilitation facilities which specialize in training or educating disabled veterans.

(9) The contractor should use all available resources to continue or establish federally-assisted apprenticeship and on-the-job training programs under 38 U.S.C. 1787.

[43 FR 49268, Oct. 20, 1978; 43 FR 51402, Nov. 3, 1978]

§ 60-250.7 Determination of disability.

Any disabled veteran filing an administrative complaint with the Veterans Employment Service under this part shall submit documentation from the Veterans Administration or military service from which the person was discharged or released which indicates his or her disability. Such documentation shall be updated within 1 year prior to filing the complaint.

§ 60-250.8 [Reserved]

§ 60-250.9 Labor unions and recruiting and training agencies.

(a) Whenever performance in accordance with the affirmative action clause or any matter contained in the regulations in this part may necessitate a revision of a collective bargaining agreement, the labor union or unions which are parties to such agreements shall be given an adequate opportunity to present their views to the Director.

(b) The Director shall use his or her best efforts, directly or through contractors, subcontractors, local officials, the Veterans Administration, veterans' organizations and all other available instrumentalities, to cause any labor union, recruiting and training agency or other representative of workers who are or may be engaged in work

under contracts and subcontracts to cooperate with, and to assist in, the implementation of the purposes of the Act.

Subpart B—General Enforcement and Complaint Procedure

§ 60-250.20 Subcontracts.

Each nonexempt prime contractor and subcontractor shall include the affirmative action clause prescribed in § 60-250.4 in each of their nonexempt subcontracts. The clause may be incorporated by reference in accordance with § 60-250.22.

§ 60-250.21 Adaptation of language.

Such necessary changes in language may be made to the affirmative action clause (see § 60-250.4) as shall be appropriate to identify properly the parties and their undertakings.

§ 60-250.22 Incorporation by reference.

The affirmative action clause and the regulations contained in this part may be incorporated by reference in all contracts and subcontracts.

§ 60-250.23 Incorporation by operation of the Act and agency regulations.

By operation of the Act, the affirmative action clause shall be considered to be a part of every contract and subcontract required by the Act and the regulations in this part to include such a clause, whether or not it is physically incorporated in such contracts and whether or not there is a written contract between the agency and the contractor.

§ 60-250.24 Duties of agencies.

(a) *General responsibility.* Each agency shall cooperate with the Director in the performance of his or her responsibilities under the Act. Such cooperation shall include the responsibility to insure that contractors are fully cognizant of their obligations under the Act and this part, to provide the Director with any information which comes to its attention that the contractor is not in compliance with the Act or this part, and to take such actions for noncompliance as set forth in § 60-250.28 as may be ordered by the Director.

§ 60-250.25 Evaluations by the Director.

The Director shall be primarily responsible for undertaking such investigations of complaints and other matters as well as evaluations of contractor and agency performance as may be necessary to assure that the purposes of the Vietnam Era Veteran's Readjustment Assistance Act, as amended are being effectively carried out.

[43 FR 49268, Oct. 20, 1978; 43 FR 51402, Nov. 3, 1978]

§ 60-250.26 Complaint procedures.

(a) *Place and time for filing.* Any applicant for employment with a contractor or any employee of a contractor may, personally or by an authorized representative, file a written complaint with the Veteran's Employment Service of the Department of Labor through the Local Veteran's Employment Representative (LVER) or his designee at the local State employment office, alleging a violation of the Act or the regulations in this part. Local Veteran's Employment Representatives (LVERs) will assist veterans in preparing complaints and will promptly refer such complaints to the Director. The LVERs will keep a record of all complaints received and forwarded. LVERs will be informed of the progress and results of the veterans' complaint investigations. The State employment services shall cooperate with the Director in the investigation of any complaint. Such complaint is to be filed not later than 180 days from the date of the alleged violation unless the time for filing is extended by the Director for good cause shown.

(b) *Referral to contractor.* When a complaint is filed by an employee of a contractor and the contractor has an applicable internal review procedure, the complaint shall be referred to the contractor for processing under that procedure. The complaint and all actions taken thereunder shall be kept confidential by the contractor. If there has not been a resolution of the complaint under that procedure satisfactory to the complainant within 60

days of the referral, the LVER will refer the complaint to the Department of Labor which will proceed as provided in this section.

(c) *Contents of complaints.* Complaints must be signed by the complainants or their authorized representatives and must contain the following information: (1) Name and address (including telephone number) of the complainant, (2) name and address of the contractor or subcontractor who committed the alleged violation, (3) a description of the act or acts considered to be a violation, (4) a copy of the veteran's form DD-214, and, where applicable, VAL-5 or similar VA certification indicating the percent of disability, updated within 1 year prior to the date the complaint is filed, and (5) other pertinent information available which will assist in the investigation and resolution of the complaint, including the name of any known Federal agency with which the employer has contracted.

(d) *Incomplete information.* Where a complaint contains incomplete information, the Director shall seek the needed information from the complainant. If the information is not furnished to the agency or the Director within 60 days of the date of such request, the case may be closed.

(e) *Investigations.* The Department of Labor shall institute a prompt investigation of each complaint, and shall be responsible for developing a complete case record. A complete case record consists of the following: (1) Name and address of each person interviewed, (2) a summary of his or her statement, (3) copies or summaries of pertinent documents, (4) a narrative summary of the evidence disclosed in the investigation as it related to each charge, and (5) recommended findings and resolution.

(f) [Reserved]

(g) *Resolution of matters.* (1) If the complaint investigation shows no violation of the Act or regulations in this part, or if the Director decides not to initiate administrative or legal proceedings against the contractor, the complainant shall be so notified. Within 30 days, the complainant may request review by the Director of such a finding or decision.

(2) Where an investigation indicates that the contractor has not complied with the requirements of the Act or this part, efforts shall be made to secure compliance through conciliation and persuasion within a reasonable time. Before the contractor or subcontractor can be found to be in compliance, it must make a specific commitment, in writing, to take corrective action to meet the requirements of the Act and this part. The commitment must indicate the precise action to be taken and dates for completion. The time period allowed should be no longer than the minimum period necessary to effect such changes. Upon approval of such commitment by the Director, the contractor may be considered in compliance on condition that the commitments are kept.

(3) Where the complaint investigation indicates a violation of the Act or regulations in this part (and the complaint has not been resolved by informal means), the Director shall afford the contractor an opportunity for a hearing in accordance with § 60-250.29.

[43 FR 49268, Oct. 20, 1978; 43 FR 51402, Nov. 3, 1978]

§ 60-250.27 Noncompliance with the affirmative action clause.

Noncompliance with the prime contractor's or subcontractor's obligations under the affirmative action clause is a ground for taking appropriate action for noncompliance as set forth in § 60-250.28 by the Director, prime contractor, or subcontractor.

§ 60-250.28 Actions for noncompliance.

(a) *General.* In every case where any complaint investigation indicates the existence of a violation of the affirmative action clause or these regulations, the matter should be resolved by informal means, including conciliation, and persuasion, whenever possible. This will also include establishing a corrective action program in accordance with § 60-250.26(g)(2). Where the apparent violation is not resolved by informal means, the Director shall proceed in accordance with the en-

forcement procedures contained in this part.

(b) *Judicial enforcement.* In addition to the administrative remedies set forth herein, the Director may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions set forth in § 60-250.4 including appropriate injunctive relief.

(c) *Withholding progress payments.* With the prior approval of the Director so much of the accrued payment due on the contract or any other contract between the Government prime contractor and the Federal Government may be withheld as necessary to correct any violations of the provisions of the affirmative action clause.

(d) *Termination.* A contract or subcontract may be canceled or terminated, in whole or in part, for failure to comply with the provisions of the affirmative action clause.

(e) *Debarment.* A prime contractor or subcontractor or a prospective contractor or subcontractor may be debarred from receiving future contracts for failure to comply with the provisions of the affirmative action clause.

§ 60-250.29 Formal hearings.

(a) *Hearing opportunity.* An opportunity for a formal hearing shall be afforded to a prime contractor or a subcontractor or a prospective prime contractor or subcontractor by the Director in any of the following circumstances:

(1) An apparent violation of the affirmative action clause by a contractor or subcontractor, as shown by any investigation, is not resolved by informal means and a hearing is requested; or

(2) The Director proposes to cancel or terminate the contract or withhold progress payments, or cause the contract to be canceled or terminated or progress payments to be withheld, in whole or in part, on a contract or contracts, or to require cancellation or termination of a contract or subcontract or withholding of progress payments; or

(3) The Director proposes to declare a prime contractor or subcontractor ineligible for further contracts or subcontracts under the Act.

(b) *Hearing practice and procedure.* (1) All hearings conducted under section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974 and the regulations in this part shall be governed by the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in 41 CFR Part 60-30. Complaints may be issued by the Solicitor, Associate Solicitor for Labor Relations and Civil Rights, Regional Solicitors and the Regional Attorney.

(2) For the purposes of hearings pursuant to this Part 60-250, references in 41 CFR Part 60-30 to "Executive Order 11246" shall mean section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974; to "equal opportunity clause" shall mean the affirmative action clause published at 41 CFR 60-250.4; and to "regulations" shall mean the regulations contained in this part.

(3) The Administrative Law Judge's recommended findings, conclusions and decision shall be certified to the Assistant Secretary, Employment Standards Administration rather than to the Secretary (see 41 CFR 60-30.27). Accordingly, exceptions to the recommended decision (41 CFR 60-30.28) shall be filed with the Assistant Secretary, Employment Standards Administration, and the final Administrative Order contemplated by 41 CFR 60-30.30 shall be issued by the Assistant Secretary Employment Standards Administration. Except for these changes in procedure, all the other provisions of the rules of practice cited in this 41 CFR 60-741.29(b) shall remain in full force and effect.

(E.O. 11246 as amended; sec. 503 of Rehabilitation Act of 1973 as amended; sec. 402 of Vietnam Era Veterans Readjustment Assistance Act of 1974)

[43 FR 49268, Oct. 20, 1978; 43 FR 51402, Nov. 3, 1978, as amended at 44 FR 49691, Aug. 24, 1979]

§ 60-250.30 Notification of agencies.

The Director shall notify the heads of all agencies of any action for noncompliance taken against any contractor after such actions have been taken. No agency may issue a waiver under

§ 60-250.3(b)(1) to any contractor subject to such action without prior approval of the Director.

§ 60-250.31 Contractor ineligibility list.

The Director shall distribute periodically a list to all executive departments and agencies giving the names of prime contractors and subcontractors who have been declared ineligible under the regulations in this part and the Act.

§ 60-250.32 Disputed matters related to the affirmative action program.

The procedures set forth in the regulations in this part govern all disputes relative to a contractor's compliance with the affirmative action clause and the requirements of this part. Any disputes relating to issues other than compliance, including contract costs arising out of the contractor's efforts to comply, shall be determined by the disputes clause of the contract.

§ 60-250.33 Responsibilities of State employment services.

(a) Any job openings listed pursuant to § 60-250.3 which requires contractors to list their job openings with State employment services offices, shall be utilized by State employment security agencies to refer qualified disabled veterans and veterans of the Vietnam era.

(b) The local offices of the Federal-State employment service shall give priority in referral to disabled veterans and veterans of the Vietnam era to such employment openings listed by contractors and subcontractors pursuant to this part.

(c) The local employment office staff will contract employers to solicit job orders. The State employment service will make available information pertinent to a determination of whether the contractor is in compliance with the mandatory listing and reporting requirements of the affirmative action clause.

Subpart C—Ancillary Matters

§ 60-250.50 Reinstatement of ineligible contractors and subcontractors.

Any prime contractor or subcontractor debarred from further contracts or subcontracts under the Act may request reinstatement in a letter directed to the Director. In connection with the reinstatement proceedings, the prime contractor or subcontractor shall be required to show that it has established and will carry out employment policies and practices in compliance with the affirmative action clause.

§ 60-250.51 Intimidation and interference.

The sanctions and penalties contained in this regulation may be exercised by the Director against any prime contractor or subcontractor, who fails to take all necessary steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in an investigation, compliance review, hearing, or any other activity related to the administration of the Act.

§ 60-250.52 Recordkeeping.

(a) Each contractor and subcontractor shall maintain for a period not less than 1 year records regarding complaints and actions taken thereunder, and such employment or other records as required by the Director or by this part and shall furnish such information in the form required by the Director or as the Director deems necessary for the administration of the Act and regulations issued under this part.

(b) Failure to maintain complete and accurate records as required under this section or failure to update annually the affirmative action program as required by § 60-250.5(b) constitutes noncompliance with the contractor's or subcontractor's obligations under the affirmative action clause and is a ground for the imposition of appropriate sanctions.

§ 60-250.53 Access to records of employment.

Each prime contractor and subcontractor shall permit access during normal business hours to its places of business, books, records and accounts pertinent to compliance with the Act, and all rules and regulations promulgated pursuant thereto for the purposes of complaint investigations, and investigations of performance under the affirmative action clause of the contract or subcontract. Information obtained in this manner shall be used only in connection with the administration of the Act.

§ 60-250.54 Rulings and interpretations.

Rulings under or interpretations of the Act and the regulations contained in this Part 60-250 shall be made by the Secretary or his or her designee.

APPENDIX A

This employer is a government contractor subject to Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974 which requires government contractors to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era. If you are a disabled veteran covered by this program and would like to be considered under the affirmative action program, please tell us. This information is voluntary and refusal to provide it will not subject you to discharge or disciplinary treatment. Information obtained concerning individuals shall be kept confidential, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of disabled veterans, and regarding necessary accommodations, and (ii) first aid personnel may be informed, when and to the extent appropriate, if the condition might require emergency treatment. In order to assure proper placement of all employees, we do request that you answer the following question: If you have a disability which might affect your performance or create a hazard to yourself or others in connection with the job for which you are applying, please state the following: (1) The skills and procedures you use or intend to use to perform the job notwithstanding the disability and (2) the accommodations we could make which would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job or other accommodations.

APPENDIX B

The following is a set of procedures which contractors may use to meet the requirements of § 60-250.6(b).

(1) The application or personnel form of each known covered veteran should be annotated to identify each vacancy for which he or she was considered, and the form should be quickly retrievable for review by the agency, the Department of Labor and the contractor's personnel officials for use in investigations and internal compliance activities.

(2) The personnel or application records of each known covered veteran should include (i) the identification of each promotion for which he or she was considered, and (ii) the identification of each training program for which he or she was considered.

(3) In each case where a covered veteran is rejected for employment, promotion or training, a statement of the reasons should be appended to the personnel file or application form. This statement should include a comparison of the qualifications of the covered veteran and the person(s) selected, as well as a description of the accommodations considered. This statement should be available to the applicant or employee concerned upon request.

(4) Where applicants or employees are selected for hire, promotion or training and the contractor undertakes any accommodation which makes it possible for him or her to place a covered veteran on the job, the application form or personnel record should contain a description of that accommodation.

PART 60-741—AFFIRMATIVE ACTION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS FOR HANDICAPPED WORKERS

Subpart A—Preliminary Matters, Affirmative Action Clause, Compliance

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60-741.50 Reinstatement of ineligible contractors and subcontractors.
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APPENDIX A—GUIDELINES ON THE APPLICATION OF THE DEFINITION "HANDICAPPED INDIVIDUAL"
APPENDIX B
APPENDIX C

AUTHORITY: Sec. 503, Pub. L. 93-1112, 87 Stat. 393 (20 U.S.C. 793), as amended by sec. 111, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706) and Executive Order 11758, unless otherwise noted.

SOURCE: 43 FR 49276, Oct. 20, 1978, unless otherwise noted.

OMB CONTROL No.: 1215-0072. (47 FR 14696, Apr. 6, 1982)

Subpart A—Preliminary Matters, Affirmative Action Clause, Compliance

§ 60-741.1 Purpose and application.

The purpose of the regulations in this part is to assure compliance with section 503 of the Rehibilitation Act of 1973, which requires government contractors and subcontractors to take affirmative action to employ and advance in employment qualified handicapped individuals. The regulations in this part apply to all government contracts and subcontracts for the furnishing of supplies or services or for the use of real or personal property (including construction) for $2,500 or more. Compliance of a contractor with the provisions of this part will not necessarily determine its compliance with the requirements of section 504 of the Rehabilitation Act of 1973 and compliance with section 504 will not necessarily determine compliance with section 503 and the regulations in this part.

§ 60-741.2 Definitions.

"Act" means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

"Affirmative action clause" means the contract provisions set forth in § 60-741.4.

"Agency" means any contracting agency of the government.

"Assistant Secretary" means the Assistant Secretary of Labor for Employment Standards or his or her designee.

"Construction" means the construction, rehabilitation, alteration, conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.

"Contract" means any government contract.

"Contracting agency" means any department, agency, establishment or instrumentality of the United States, including any wholly owned government corporation, which enters into contracts.

"Contractor" means, unless otherwise indicated, a prime contractor or subcontractor.

"Director" means the Director of the Office of Federal Contract Compliance Programs of the United States Department of Labor or his/her designee.

"Government" means the government of the United States of America.

"Government contract" means any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property including lease arrangements. The term "services", as used in this section includes, but is not

limited to the following services: Utility, construction, transportation, research, insurance, and fund depository, irrespective of whether the government is the purchaser or seller. The term "government contract" does not include (1) agreements in which the parties stand in the relationship of employer and employee, and (2) federally-assisted contracts.

"Handicapped individual" means any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. For purposes of this part, a handicapped individual is "substantially limited" if he or she is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap. (See Appendix A attached for guidelines on the applications of this definition.)

"Modification" means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

"Person" means any natural person, corporation, partnership or joint venture, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

"Prime contractor" means any person holding a contract, and, for the purposes of Subpart B of this part, includes any person who has held a contract subject to the Act.

"Qualified handicapped individual" means a handicapped individual as defined in § 60-741.2 who is capable of performing a particular job, with reasonable accommodation to his or her handicap.

"Recruiting and training agency" means any person who refers workers to any contractor or subcontractor, or who provides or supervises apprenticeship or training for employment by any contractor or subcontractor.

"Rules, regulations, and relevant orders of the Secretary of Labor" as used in paragraph (b) of the affirmative action clause means rules, regulations, and relevant orders of the Secretary of Labor or his or her designee issued pursuant to the Act.

"Secretary" means the Secretary of Labor, U.S. Department of Labor.

"Subcontract" means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.

"Subcontractor" means any person holding a subcontract and, for the purpose of Subpart B of this part, any person who has held a subcontract subject to the Act.

"United States" as used herein shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, the Panama Canal Zone, American Samoa and the Trust Territory of the Pacific Islands.

(E.O. 11246 (30 FR 12319) as amended by E.O. 11375 and 12086; sec. 503, Pub. L. 93-112, 87 Stat. 393 (29 U.S.C. 793), as amended by sec. 111, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706) and Executive Order 11758; sec. 503(a), Pub. L. 92-540, 86 Stat. 1097 (38 U.S.C. 2012), as amended by sec. 402, Pub. L. 93-508, 88 Stat. 1593 (38 U.S.C. 2012))

[43 FR 49276, Oct. 20, 1978, as amended at 45 FR 9272, Feb. 12, 1980]

§ 60-741.3 Coverage and waivers.

(a) *General.* (1) Transactions for less than $2,500. Contracts and subcontracts for less than $2,500 are not covered by the Act. No agency, contractor or subcontractor shall procure supplies or services in less than usual quantities to avoid the applicability of the affirmative action clause.

(2) Contracts and subcontracts for indefinite quantities. With respect to indefinite delivery-type contracts and subcontracts (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, "call-type" contracts, and purchase notice agreements), the affirmative action clause shall be included unless the contract-

ing agency has reason to believe that the amount to be ordered in any year under such contract will be less than $2,500. The applicability of the affirmative action clause shall be determined at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the affirmative action clause shall be applied to such contract whenever the amount of a single order is $2,500 or more. Once the affirmative action clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) Work outside the United States. The requirements of the affirmative action clause are waived with respect to contracts and subcontracts with regard to work performed outside the United States by employees who were not recruited within the United States.

(4) Contracts with State or local governments. The requirements of the affirmative action clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract.

(5) Facilities not connected with contracts. The Director may waive the requirements of the affirmative action clause with respect to any of a prime contractor's or subcontractor's facilities which he or she finds to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, provided that he or she also finds that such a waiver will not interfere with or impede the effectuation of the Act. Such waivers shall be considered only upon the request of the contractor or subcontractor.

(b) *Waivers.* (1) Specific contracts and classes of contracts. The head of an agency, with the concurrence of the Director, may waive the application to any contract or subcontract of any part of or all the affirmative action clause when he or she deems that special circumstances in the national interest so require. The agency head, with the concurence of the Director, may also grant such waivers to groups or categories of contracts or subcontracts of the same type where it is (i) in the national interest, (ii) found impracticable to act upon each request individually, and (iii) where such waiver will substantially contribute to convenience in administration of section 503 of the Act.

(2) National security. Any requirement set forth in the regulations in this part shall not apply to any contract or subcontract whenever the head of the contracting agency determines that such contract or subcontract is essential to the national security and that its award without complying with such requirements is necessary to the national security. Upon making such a determination the head of the agency will notify the Director in writing within 30 days.

(c) *Withdrawal of waiver.* When a waiver has been granted for any class of contracts or subcontracts under this section other than contracts granted waivers under paragraph (b)(2) of this section, the Director may withdraw the waiver for a specific contract or subcontract or group of contracts or subcontracts to be awarded, when in his or her judgment such action is necessary or appropriate to achieve the purposes of the Act. The withdrawal shall not apply to contracts or subcontracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

[43 FR 49276, Oct. 20, 1978; 43 FR 51402, Nov. 3, 1978]

§ 60-741.4 Affirmative action clause.

Each agency and each contractor and subcontractor shall include the following affirmative action clause in each of its covered government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract).

AFFIRMATIVE ACTION FOR HANDICAPPED WORKERS

(a) The contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: Employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(b) The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(c) In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(d) The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, provided by or through the contracting officer. Such notices shall state the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified handicapped employees and applicants for employment, and the rights of applicants and employees.

(e) The contractor will notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of section 503 of the Rehabilitation Act of 1973, and is committed to take affirmative action to employ and advance in employment physically and mentally handicapped individuals.

(f) The contractor will include the provisions of this clause in every subcontract or purchase order of $2,500 or more unless exempted by rules, regulations, or orders of the Secretary issued pursuant to section 503 of the Act, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director of the Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

§ 60-741.5 Applicability of the affirmative action program requirement.

(a) Within 120 days of the commencement of a contract every government contractor or subcontractor holding a contract of $50,000 or more and having 50 or more employees shall prepare and maintain an affirmative action program at each establishment which shall set forth the contractor's policies, practices and procedures in accordance with § 60-741.6 of this part. This program may be integrated into or kept separate from other affirmative action programs of the contractor. Contractors presently holding government contracts shall update their affirmative action programs within 120 days of the effective date of this part.

(b) The affirmative action program shall be reviewed and updated annually. If there are any significant changes in procedures, rights or benefits as a result of the annual updating, those changes shall be communicated to employees and applicants for employment.

(c)(1) The contractor shall invite all applicants and employees who believe themselves covered by the Act and who wish to benefit under the affirmative action program to identify themselves to the contractor. The invitation shall state that the information is voluntarily provided, that it will be kept confidential, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with the Act and the regulations in this part. If an applicant or employee so identifies himself or herself the contractor should also seek the advice of the applicant or employee regarding proper placement and appropriate acommodation. (An acceptable form for such an invitation is set forth in Appendix B of this part.)

(2) Nothing in this section shall preclude an employee from informing a contractor at any future time of his or her desire to benefit under the program.

(3) Nothing in this section shall relieve a contractor of its obligation to take affirmative action with respect to those applicants or employees of

whose handicap the contractor has actual knowledge: *Provided*, That the contractor is not obligated to search the medical files of any applicant or employee to determine the existence of a handicap.

(4) Nothing in this section shall relieve a contractor from liability for discrimination under the Act.

(d) The full affirmative action program shall be available for inspection to any employee or applicant for employment upon request. The location and hours during which the program may be obtained shall be posted at each facility.

§ 60-741.6 Affirmative action policy, practices, and procedures.

(a) *General requirements.* Under the affirmative action obligation imposed by section 503 of the Rehabilitation Act of 1973, contractors are required to take affirmative action to employ and advance in employment qualified handicapped individuals at all levels of employment, including the executive level. Such action shall apply to all employment practices, including, but not limited to, the following: Hiring, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(b) *Proper consideration of qualifications.* Contractors shall review their personnel processes to determine whether their present procedures assure careful, thorough and systematic consideration of the job qualifications of known handicapped applicants and employees for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. To the extent that it is necessary to modify their personnel procedures, contractors shall include the development of new procedures for this purpose in their affirmative action program required under this part. These procedures must be designed so as to facilitate a review of the implementation of this requirement by the contractor or the Government. (Appendix C of this part is an example of an appropriate set of procedures. The procedures in Appendix C are not required and contractors may develop other procedures which are appropriate to their circumstances.)

(c) *Physical and mental qualifications.* (1) The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the review of all physical or mental job qualification requirements to insure that, to the extent qualification requirements tend to screen out qualified handicapped individuals, they are job related and are consistent with business necessity and the safe performance of the job.

(2) Whenever a contractor applies physical or mental job qualification requirements in the selection of applicants or employees for employment or other change in employment status such as promotion, demotion or training, to the extent that qualification requirements tend to screen out qualified handicapped individuals, the requirements shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and the safe performance of the job. The contractor shall have the burden to demonstrate that it has complied with the requirements of this paragraph.

(3) Nothing in this section shall prohibit a contractor from conducting a comprehensive medical examination prior to employment provided that the results of such an examination shall be used only in accordance with the requirements of this section. Whenever a contractor inquires into an applicant's or employee's physical or mental condition or conducts a medical examination prior to employment or change in employment status information obtained in response to such inquiries or examination shall be kept confidential except that:

(i) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped individuals and regarding accommodations; and

(ii) First aid and safety personnel may be informed, where and to the extent appropriate, if the condition might require emergency treatment; and

(iii) Government officials investigating compliance with the Act shall be informed.

(d) *Accommodation to physical and mental limitations of employees.* A contractor must make a reasonable accommodation to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business. In determining the extent of a contractor's accommodation obligations, the following factors among others may be considered: (1) Business necessity and (2) financial cost and expenses.

(e) *Compensation.* In offering employment or promotions to handicapped individuals, the contractor may not reduce the amount of compensation offered because of any disability income, pension or other benefit the applicant or employee receives from another source.

(f) *Outreach, positive recruitment, and external dissemination of policy.* Contractors shall review their employment practices to determine whether their personnel programs provide the required affirmative action for employment and advancement of qualified handicapped individuals. Based upon the findings of such reviews, contractor shall undertake appropriate outreach and positive recruitment activities, such as those listed below. It is not contemplated that contractors will necessarily undertake all the listed activities or that their activities will be limited to those listed. The scope of a contractor's efforts shall depend upon all the circumstances, including the contractor's size and resources and the extent to which existing employment practice are adequate.

(1) The contractor should develop internal communication of its obligation to engage in affirmative action efforts to employ qualified handicapped individuals in such a manner as to foster understanding, acceptance and support among the contractor's executive, management, supervisory and all other employees and to encourage such persons to take the necessary action to aid the contractor in meeting this obligation.

(2) The contractor should develop reasonable internal procedures to ensure that its obligation to engage in affirmative action to employ and promote qualified handicapped individuals is being fully implemented.

(3) The contractor should periodically inform all employees and prospective employees of its commitment to engage in affirmative action to increase employment opportunities for qualified handicapped individuals.

(4) The contractor should enlist the assistance and support of recruiting sources (including State employment security agencies, State vocational rehabilitation agencies or facilities, sheltered workshops, college placement officers, State education agencies, labor organizations and organizations of or for handicapped individuals) for the contractor's commitment to provide meaningful employment opportunities to qualified handicapped individuals. (A list of numerous national organizations serving the handicapped, many of which have State or local affiliates, is found in the "Directory of Organizations Interested in the Handicapped" published by the Committee for the Handicapped People-to-People Program, Washington, D.C.)

(5) The contractor should engage in recruitment activities at educational institutions which participate in training of the handicapped, such as schools for the blind, deaf, or retarded.

(6) The contractor should establish meaningful contracts with appropriate social service agencies, organizations of and for handicapped individuals, vocational rehabilitation agencies or facilities, for such purposes as advice, technical assistance and referral of potential employees. Technical assistance from the resources described in this paragraph may consist of advice on proper placement, recruitment, training and accommodations contractors may undertake, but no such resource providing technical assistance shall have the authority to approve or disapprove the acceptability of affirmative action programs.

(7) The contractor should review employment records to determine the availability of promotable and transferable qualified known handicapped

individuals presently employed, and to determine whether their present and potential skills are being fully utilized or developed.

(8) The contractor should include handicapped workers when employees are pictured in consumer, promotional or help wanted advertising.

(9) The contractor should send written notification of company policy to all subcontractors, vendors and suppliers, requesting appropriate action on their part.

(10) The contractor should take positive steps to attract qualified handicapped persons not currently in the work force who have requisite skills and can be recruited through affirmative action measures. These persons may be located through the local chapters of organizations of and for handicapped individuals described in paragraph (f)(4).

(g) *Internal dissemination of policy.* A strong outreach program will be ineffective without adequate internal support from supervisory and management personnel and other employees, who may have had limited contact with handicapped persons in the past. In order to assure greater employee cooperation and participation in the contractor's efforts, the contractor should adopt, implement and disseminate this policy internally as follows:

(1) Include it in the contractor's policy manual.

(2) Publicize it in the company newspaper, magazine, annual report and other media.

(3) Conduct special meetings with executive, management, and supervisory personnel to explain the intent of the policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude.

(4) Schedule special meetings with all employees to discuss policy and explain individual employee responsibilities.

(5) Discuss the policy thoroughly in both employee orientation and management training programs.

(6) Meet with union officials to inform them of the contractor's policy, and request their cooperation.

(7) Include nondiscrimination clauses in all union agreements, and review all contractual provisions to ensure they are nondiscriminatory.

(8) Include articles on accomplishments of handicapped workers in company publications.

(9) Post the policy on company bulletin boards, including a statement that employees and applicants are protected from coercion, intimidation, interference or discrimination for filing a complaint or assisting in an investigation under the Act.

(10) When employees are featured in employee handbooks or similar publications for employees, include handicapped employees.

(h) *Responsibility for implementation.* An executive of the contractor should be designated as director or manager of company affirmative action activities under these regulations. His or her identity should appear on all internal and external communications regarding the company's affirmative action programs. This executive should be given necessary top management support and staff to manage the implementation of this program, including the following activities:

(1) Develop policy statements, affirmative action programs, and internal and external communication techniques. The latter techniques should include regular discussions with local managers, supervisors and employees to be certain the contractor's policies are being followed. In addition, supervisors should be advised that:

(i) Their work performance is being evaluated on the basis of their affirmative action efforts and results, as well as other criteria.

(ii) The contractor is obligated to prevent harassment of employees placed through affirmative action efforts, as set forth in § 60-741.51.

(2) Identify problem areas in conjunction with line management and known handicapped employees, in the implementation of the affirmative action programs, and develop solutions. This is particularly important for the accommodations requirements.

(3) Design and implement audit and reporting systems that will:

(i) Measure effectiveness of the contractor's programs.

(ii) Indicate need for remedial action.

(iii) Determine the degree to which the contractor's objectives have been attained.

(iv) Determine whether known handicapped employees have had the opportunity to participate in all company sponsored educational, training, recreational and social activities.

(v) Ensure that each location is in compliance with the Act and the regulations in this part.

(4) Serve as liaison between the contractor and OFCCP.

(5) Serve as liaison between the contractor and organizations of and for handicapped persons, and arrange for the active involvement by company representatives in the community service programs of local organizations of and for the handicapped.

(6) Keep management informed of the latest developments in the entire affirmative action area.

(7) Arrange for career counseling for known handicapped employees.

(i) *Development and execution of affirmative action programs.* (1) Job qualification requirements reviewed pursuant to paragraph (c) of this section should be made available to all members of management involved in the recruitment, screening, selection, and promotion process.

(2) The contractor should evaluate the total selection process including training and promotion to ensure freedom from stereotyping handicapped persons in a manner which limits their access to all jobs for which they are qualified.

(3) All personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes should be carefully selected and trained to ensure that the commitments in its affirmative action program are implemented.

(4) Formal briefing sessions should be held, preferably on company premises, with representatives from recruiting sources. Plant tours, clear and concise explanations of current and future job openings, position, descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefings. Formal arrangements should be made for referral of applicants, follow up with sources, and feedback on disposition of applicants.

(5) A special effort should be made to include qualified handicapped persons on the personnel relations staff.

(6) Handicapped employees should be made available for participation in career days, youth motivation programs, and related activities in their communities.

(7) Recruiting efforts at all schools should incorporate special efforts to reach handicapped students.

(8) An effort should be made to participate in workstudy programs with rehabilitation facilities and schools which specialize in training or educating handicapped individuals.

(9) The contractor should use all available resources to continue or establish on the job training programs.

(j) *Sheltered workshops.* Contracts with sheltered workshops do not constitute affirmative action in lieu of employment and advancement of qualified handicapped individuals in the contractor's own workforce. Contracts with sheltered workshops may be included within an affirmative action program if the sheltered workshop trains employees for the contractor and the contractor is obligated to hire trainees at full compensation when such trainees become qualified as "qualified handicapped individual" as defined in § 60-741.2.

[43 FR 49276, Oct. 20, 1978; 43 FR 51402, Nov. 3, 1978]

§ 60-741.7 Determination of handicap.

(a) Any handicapped individual filing a complaint with the Director under this part shall submit with his or her complaint a signed statement specifying the handicapping impairment or situation (see § 60-741.2 definition of "handicapped individual"). If the Director determines that further documentation is necessary, he or she may require the complainant to provide additional information.

(b) Any contractor requiring a determination of an applicant's or employee's handicap may require the applicant or employee to provide medical documentation of the impairment or,

in the alternative, may require the applicant or employee to undergo a medical examination at the contractor's expense.

(c) Any determination of handicap required pursuant to paragraph (b) of this section must meet the requirements of § 60-741.5(c) and must be for the purpose of affirmative action and proper job placement. Information obtained therefrom shall not be used to exclude or otherwise limit the employment opportunities of qualified handicapped individuals.

(d) All medical documentation required under this section shall be based upon the American Medical Association Guides to the Evaluation of Permanent Impairment, provided that the Guides shall be used only to determine the existence of impairment without regard to the degree of impairment.

[43 FR 49276, Oct. 20, 1978; 43 FR 51402, Nov. 3, 1978]

§ 60-741.8 Listing of employment openings.

Contractors should request State employment security agencies to refer qualified handicapped individuals for consideration under their affirmative action programs.

§ 60-741.9 Labor unions and recruiting and training agencies.

(a) Whenever performance in accordance with the affirmative action clause or any matter contained in the regulations in this part may necessitate a revision of a collective bargaining agreement, the labor union or unions which are parties to such agreements shall be given an adequate opportunity to present their views to the Director.

(b) The Director shall use his or her best efforts, directly or through contractors, subcontractors, local officials, vocational rehabilitation facilities, and all other available instrumentalities, to cause any labor union, recruiting and training agency or other representative of workers who are or may be engaged in work under contracts and subcontracts to cooperate with, and to assist in, the implementation of the purposes of the Act.

Subpart B—General Enforcement and Complaint Procedure

§ 60-741.20 Subcontracts.

Each nonexempt prime contractor and subcontractor shall include the affirmative action clause prescribed in § 60-741.4 in each of their nonexempt subcontracts. The clause may be incorporated by reference in accordance with § 60-741.22.

§ 60-741.21 Adaptation of language.

Such necessary changes in language may be made to the affirmative action clause (see § 60-741.4) as shall be appropriate to identify properly the parties and their undertakings.

§ 60-741.22 Incorporation by reference.

The affirmative action clause and the regulations contained in this part may be incorporated by reference in all contracts and subcontracts.

§ 60-741.23 Incorporation by operation of the Act and agency regulations.

By operation of the Act, the affirmative action clause shall be considered to be a part of every contract and subcontract required by the Act and the regulations in this part to include such a clause, whether or not it is physically incorporated in such contracts and whether or not there is a written contract between the agency and the contractor.

§ 60-741.24 Duties of agencies.

(a) General responsibility. Each agency shall cooperate with the Director in the performance of his or her responsibilities under the Act. Such cooperation shall include the responsibility to insure that contractors are fully cognizant of their obligations under the Act and this part, to provide the Director with any information which comes to its attention that the contractor is not in compliance with the Act or this part, and to take such actions for noncompliance as set forth in § 60-741.28 as may be ordered by the Director.

§ 60-741.25 Evaluations by the Director.

The Director shall be primarily responsible for undertaking such investigations of complaints and other matters as well as evaluations of contractor and agency performance as may be necessary to assure that the purposes of section 503 of the Rehabilitation Act of 1973 are being effectively carried out.

§ 60-741.26 Complaint procedures.

(a) *Place and time of filing.* Any applicant for employment with a contractor or any employee of a contractor may, personally or by an authorized representative, file a written complaint with the Director alleging a violation of the Act or the regulations in this part. Such complaint must be filed within 180 days from the date of the alleged violation, unless the time for filing is extended by the Director for good cause shown.

(b) *Referral to contractor.* When a complaint is filed by an employee of a contractor and the contractor has an applicable internal review procedure, the complaint shall be referred to the contractor for processing under that procedure. The complaint and all actions taken thereunder shall be kept confidential by the contractor. If there has not been a resolution of the complaint under that procedure satisfactory to the complainant within 60 days of the referral, the Department of Labor will proceed as provided in this section.

(c) *Contents of complaints.* Complaints must be signed by the complainants or their authorized representatives and must contain the following information: (1) Name and address (including telephone number) of the complainant, (2) name and address of the contractor or subcontractor who committed the alleged violation, (3) a description of the act or acts considered to be a violation, (4) a signed statement that the individual is handicapped or has a history of a handicap or other documentation of impairment or was regarded by the contractor as having an impairment, and (5) other pertinent information available which will assist in the investigation and resolution of the complaint, including the name of any known Federal agency with which the employer has contracted.

(d) *Incomplete information.* Where a complaint contains incomplete information, the Director shall seek the needed information from the complainant. If the information is not furnished to the Director within 60 days of the date of such request, the case may be closed.

(e) *Investigations.* The Department of Labor shall institute a prompt investigation of each complaint, and shall be responsible for developing a complete case record. A complete case record consists of the following: (1) Name and address of each person interviewed, (2) a summary of his or her statement, (3) copies or summaries of pertinent documents, (4) a narrative summary of the evidence disclosed in the investigation as it related to each charge, and (5) recommended findings and resolution.

(f) [Reserved]

(g) *Resolution of matters.* (1) If the complaint investigation shows no violation of the Act or regulations in this part, or if the Director decides not to initiate administrative or legal proceedings against the contractor, the complainant shall be so notified. Within 30 days, the complainant may request review by the Director of such a finding or decision.

(2) Where an investigation indicates that the contractor has not complied with the requirements of the Act or this part, efforts shall be made to secure compliance through conciliation and persuasion within a reasonable time. Before the contractor or subcontractor can be found to be in compliance, it must make a specific commitment, in writing, to take corrective action to meet the requirements of the Act and this part. The commitment must indicate the precise action to be taken and dates for completion. The time period allowed should be no longer than the minimum period necessary to effect such changes. Upon approval of such commitment by the Director, the contractor may be considered in compliance on condition that the commitments are kept.

(3) Where the complaint investigation indicates a violation of the Act or

regulations in this part (and the complaint has not been resolved by informal means), the Director shall afford the contractor an opportunity for a hearing in accordance with § 60-741.29.

[43 FR 49276, Oct. 20, 1978; 43 FR 51402, Nov. 3, 1978]

§ 60-741.27 Noncompliance with the affirmative action clause.

Noncompliance with the prime contractor's or subcontractor's obligations under the affirmative action clause is a ground for taking appropriate action for noncompliance as set forth in § 60-741.28 by the Director, prime contractor, or subcontractor.

§ 60-741.28 Actions for noncompliance.

(a) *General.* In every case where any complaint investigation indicates the existence of a violation of the affirmative action clause or these regulations, the matter should be resolved by informal means, including conciliation, and persuasion, whenever possible. This will also include establishing a corrective action program in accordance with § 60-741.26(g)(2). Where the apparent violation is not resolved by informal means, the Director shall proceed in accordance with the enforcement procedures contained in this part.

(b) *Judicial enforcement.* In addition to the administrative remedies set forth herein, the Director may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions set forth in § 60-741.4 including appropriate injunctive relief.

(c) *Withholding progress payments.* With the prior approval of the Director so much of the accrued payment due on the contract or any other contract between the government prime contractor and the Federal Government may be withheld as necessary to correct any violations of the provisions of the affirmative action clause.

(d) *Termination.* A contract or subcontract may be canceled or terminated, in whole or in part, for failure to comply with the provisions of the affirmative action clause.

(e) *Debarment.* A prime contractor or subcontractor or a prospective contractor or subcontractor may be debarred from receiving future contracts for failure to comply with the provisions of the affirmative action clause.

§ 60-741.29 Formal hearings.

(a) *Hearing opportunity.* An opportunity for a formal hearing shall be afforded to a prime contractor or a subcontractor or a prospective prime contractor or subcontractor by the Director in any of the following circumstances:

(1) An apparent violation of the affirmative action clause by a contractor or subcontractor, as shown by any investigation, is not resolved by informal means and a hearing is requested; or

(2) The Director proposes to cancel or terminate the contract or withhold progress payments, or cause the contract to be canceled or terminated or progress payments to be withheld, in whole or in part, on a contract or contracts, or to require cancellation or termination of a contract or subcontract or withholding of progress payments; or

(3) The Director proposes to declare a prime contractor or subcontractor ineligible for further contracts or subcontracts under the Act.

(b) Hearing practice and procedure. (1) All hearings conducted under section 503 of the Rehabilitation Act of 1973, as amended, and the regulations in this Part shall be governed by the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in 41 CFR Part 60-30. Complaints may be issued by the Solicitor, Associate Solicitor for Labor Relations and Civil Rights, Regional Solicitors, and the Regional Attorney.

(2) For the purposes of hearings pursuant to this Part 60-741, references in 41 CFR Part 60-30 to "Executive Order 11246" shall mean section 503 of the Rehabilitation Act of 1973, as amended; to "equal opportunity clause" shall mean the affirmative action clause published at 41 CFR 60-741.4; and to "regulations" shall mean the regulations contained in this Part 60-741.

(3) The Administrative Law Judge's recommended findings, conclusions

and decision shall be certified to the Assistant Secretary, Employment Standards Administration rather than to the Secretary (see 41 CFR 60-30.27). Accordingly, exceptions to the recommended decision (41 CFR 60-30.28) shall be filed with the Assistant Secretary, Employment Standards Administration, and the final Administrative Order contemplated by 41 CFR 60-30.30 shall be issued by the Assistant Secretary, Employment Standards Administration. Except for these changes in procedure, all the other provisions of the rules of practice cited in this 41 CFR 60-741.29(b) shall remain in full force and effect.

(E.O. 11246 as amended; sec. 503 of Rehabilitation Act of 1973 as amended; sec. 402 of Vietnam Era Veterans Readjustment Assistance Act of 1974)

[43 FR 49276, Oct. 20, 1978, as amended at 44 FR 49691, Aug. 24, 1979]

§ 60-741.30 Notification of agencies.

The Director shall notify the heads of all agencies of any action for noncompliance taken against any contractor after such actions have been taken. No agency may issue a waiver under § 60-741.3(b)(1) to any contractor subject to such action without prior approval of the Director.

§ 60-741.31 Contractor ineligibility list.

The Director shall distribute periodically a list to all executive departments and agencies giving the names of prime contractors and subcontractors who have been declared ineligible under the regulations in this part and the Act.

§ 60-741.32 Disputed matters related to the affirmative action program.

The procedures set forth in the regulations in this part govern all disputes relative to a contractor's compliance with the affirmative action clause and the requirements of this part. Any disputes relating to issues other than compliance, including contract costs arising out of the contractor's efforts to comply, shall be determined by the disputes clause of the contract.

Subpart C—Ancillary Matters

§ 60-741.50 Reinstatement of ineligible contractors and subcontractors.

Any prime contractor or subcontractor debarred from further contracts or subcontracts under the Act may request reinstatement in a letter directed to the Director. In connection with the reinstatement proceedings, the prime contractor or subcontractor shall be required to show that it has established and will carry out employment policies and practices in compliance with the affirmative action clause.

§ 60-741.51 Intimidation and interference.

The sanctions and penalties contained in this regulation may be exercised by the Director against any prime contractor or subcontractor, who fails to take all necessary steps to insure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in an investigation, compliance review, hearing, or any other activity related to the administration of the Act.

§ 60-741.52 Recordkeeping.

(a) Each contractor and subcontractor shall maintain for a period not less than 1 year records regarding complaints and actions taken thereunder, and such employment or other records as required by the Director or by this part and shall furnish such information in the form required by the Director or as the Director deems necessary for the adminstration of the Act and regulations issued under this part.

(b) Failure to maintain complete and accurate records as required under this section or failure to update annually the affirmative action program as required by § 60-741.5(b) constitutes noncompliance with the contractor's or subcontractor's obligatons under the affirmative action clause and is a ground for the imposition of appropriate sanctions.

§ 60-741.53 Access to records of employment.

Each prime contractor and subcontractor shall permit access during normal business hours to its places of business, books, records and accounts pertinent to compliance with the Act, and all rules and regulations promulgated pursuant thereto for the purposes of complaint investigations, and investigations of performance under the affirmative action clause of the contract or subcontract. Information obtained in this manner shall be used only in connection with the administration of the Act.

§ 60-741.54 Rulings and interpretations.

Rulings under or interpretations of the Act and the regulations contained in this Part 741 shall be made by the Secretary or his or her designee.

APPENDIX A—"GUIDELINES ON THE APPLICATION OF THE DEFINITION HANDICAPPED INDIVIDUAL"

The Rehabilitation Act of 1973, as amended, defines a handicapped individual for the purposes of the program as any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such an impairment.

"Life activities" may be considered to include communication, ambulation, selfcare, socialization, education, vocational training, employment, transportation, adapting to housing, etc. For the purpose of section 503 of the Act, primary attention is given to those life activities that affect employability.

The phrase *"substantially limits"* means the degree that the impairment affects employability. A handicapped individual who is likely to experience difficulty in securing, retaining or advancing in employment would be considered substantially limited.

"Has a record of such an impairment" means that an individual may be completely recovered from a previous physical or mental impairment. It is included because the attitude of employers, supervisors, and coworkers toward that previous impairment may result in an individual experiencing difficulty in securing, retaining, or advancing in employment. The mentally restored, those who have had heart attacks or cancer often experience such difficulty. Also, this part of the definition would include individuals who may have been erroneously classified and may experience discrimination based on this misclassification. This group may include persons such as those who have been misclassified as mentally retarded or mentally restored.

"Is regarded as having such an impairment" refers to those individuals who are perceived as having a handicap, whether an impairment exists or not, but who, because of attitudes or for any other reason, are regarded as handicapped by employers, or supervisors who have an effect on the individual securing, retaining or advancing in employment.

APPENDIX B

1. This employer is a government contractor subject to section 503 of the Rehabilitation Act of 1973, which requires government contractors to take affirmative action to employ and advance in employment qualified handicapped individuals. If you have such a handicap and would like to be considered under the affirmative action program, please tell us. Submission of this information is voluntary and refusal to provide it will not subject you to discharge or disciplinary treatment. Information obtained concerning individuals shall be kept confidential, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of handicapped individuals, and regarding necessary accommodations, (ii) first aid and safety personnel may be informed, when and to the extent appropriate, if the condition might require emergency treatment, and (iii) government officials investigating compliance with the Act shall be informed.

2. If you are handicapped, we would like to include you under the affirmative action program. It would assist us if you tell us about (1) any special methods, skills and procedures which qualify you for positions that you might not otherwise be able to do because of your handicap, so that you will be considered for any positions of that kind, and (2) the accommodations which we could make which would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job, or other accommodations.

APPENDIX C

The following is a set of procedures which contractors may use to meet the requirements of § 60-741.6(b).

(1) The application or personnel form of each known handicapped applicant should be annotated to identify each vacancy for which the applicant was considered, and the form should be quickly retrievable for

review the Department of Labor and the contractor's personnel officials for use in investigations and internal compliance activities.

(2) The personnel or application records of each known handicapped employee should include (i) the identification of each promotion for which the handicapped employee was considered, and (ii) the identification of each training program for which the handicapped employee was considered.

(3) In each case where a handicapped employee or applicant is rejected for employment, promotion or training, a statement of the reason should be appended to the personnel file or application form. This statement should include a comparison of the qualifications of the handicapped applicant or employee and the person(s) selected, as well as a description of the accommodations considered. This statement should be available to the applicant or employee concerned upon request.

(4) Where applicants or employees are selected for hire, promotion or training and the contractor undertakes any accommodation which makes it possible for him or her to place a handicapped individual on the job, the application form or personnel record should contain a description of that accommodation.

[43 FR 49276, Oct. 20, 1978; 43 FR 51402, Nov. 3, 1978]

CHAPTERS 61–100 [RESERVED]

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FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

Appendix—Postponed Regulations
Material Approved for Incorporation by Reference
Table of CFR Titles and Chapters
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List of CFR Sections Affected

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Appendix—Postponed Regulations

Chapter 60—Office of Federal Contract Compliance Programs

The President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), directed Federal agencies to postpone for sixty days from January 29, 1981, the effective date of all regulations that they had promulgated in final form and had scheduled to become effective during such sixty day period. (See also E.O. 12291, 46 FR 13193, Feb. 19 1981.)

At the expiration of the sixty day period, certain of these regulations were withdrawn or further postponed. Where a regulation has been postponed to a date beyond the revision date of the individual CFR volume in which it would be codified, the Office of the Federal Register has elected to publish the text of the postponed regulation in this appendix to the volume pending further action by the issuing agency.

(Note: Parts 60-1, 60-2, 60-4, 60-20, 60-30, 60-50, 60-250, and 60-741 were revised and Part 60-60 was removed at 45 FR 86228, Dec. 30, 1980 and corrected at 46 FR 7333, Jan. 23, 1981, effective January 29, 1981. As of the revision date of this volume (July 1, 1982) the effective date was further postponed to the following dates:

April 29, 1981, 46 FR 9084, Jan. 28, 1981
June 29, 1981, 46 FR 23742, Apr. 28, 1981
July 15, 1981, 46 FR 33033, June 26, 1981
August 26, 1981, 46 FR 36144, July 14, 1981
Indefinitely, 46 FR 42865, Aug. 25, 1981

Consult the daily FEDERAL REGISTER for further postponements.)

PART 60-1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

Subpart A—Preliminary Matters; Equal Opportunity Clause; Compliance Reports

Sec.
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60-1.2 Administrative responsibility.
60-1.3 Definitions.
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60-1.20 Compliance reviews.
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60-1.40 Affirmative action programs.
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60-1.45 Adaptation of language.
60-1.46 Incorpration by reference.
60-1.47 Incorporation by operation of law.
60-1.48 Request for hearing after compliance.
60-1.49 Existing contracts and subcontracts.
60-1.50 Delegation of authority by the Director.

AUTHORITY: Sec. 201, 202, 205, 211, 301, 302, 303, 401, E.O. 11246 (30 FR 12319), as amended by E.O. 12086; Sec. 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 2012); Sec. 503 of the Rehabilitation Act of 1973, (29 U.S.C. 793), as amended by Sec. 111(a), Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706) and by Sections 119 and 122 of the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, 92 Stat. 2955 and Executive Order 11758.

SOURCE: 45 FR 86228, Dec. 30, 1980, unless otherwise noted.

Subpart A—Preliminary Matters Equal Opportunity Clause: Compliance Reports

§ 60-1.1 Purpose and application.

(a) The purpose of the regulations in this part is to set forth the general obligations of Government contractors and subcontractors (hereinafter referred to simply as contractor; see definition of contractor in § 60-1.3) and of contractors performing on federally assisted construction contracts and subcontracts (hereinafter referred to simply as contract; see definition of contract in § 60-1.3) under Executive Order 11246, and to promote and ensure equal opportunity for all persons, without regard to race, color, religion, sex, or national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts. The regulations in this part also set forth some general obligations which are equally applicable to contractors covered by section 503 of the Rehabilitation Act of 1973, as amended, and section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974. When the regulations in this part implement sections 402 and 503 the regulations expressly indicate that fact. Specific obligations of contractors covered under the three laws are set forth in other parts of the regulations in this chapter.

(b) The regulations in this part apply to all contracting agencies of the Government and to contractors which perform under Government contracts. The regulations in this part also apply to all agencies of the Government administering programs involving Federal financial assistance which results in a construction contract, to applicants seeking or receiving such assistance and to all contractors performing under construction contracts which are related to any such programs. The procedures set forth in the regulations in this chapter govern all disputes relative to a contractor's compliance with its obligations under the three laws regardless of whether its contract contains a "Disputes" clause. Failure of a contractor or applicant to comply with any provision of the regulations in this part shall be grounds for the imposition of any or all the sanctions authorized by the Order or by the regulations implementing sections 402 and 503. The regulations in this chapter do not apply in any action taken to effect compliance with respect to employment practices subject to Title VI of the Civil Rights Act of 1964. The rights and remedies of the Government hereunder are not exclusive and do not affect rights and remedies provided elsewhere by law, regulation, or contract; neither do the regulations limit the exercise by the Secretary of powers not herein specifically set forth but granted to him/her by the Order or by sections 102 and 503.

[45 FR 86228, Dec. 30, 1980; 46 FR 7333, Jan. 23, 1981]

§ 60-1.2 Administrative responsibility.

The Director has been delegated authority and assigned responsibility for carrying out the responsibilities assigned to the Secretary under the Executive Order. All correspondence regarding the Order should be directed to the Director, Office of Federal Contract Compliance Programs, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210.

§ 60-1.3 Definitions.

As used in this chapter, "Act" means the Vietnam Era Veterans Readjustment Assistance Act, as amended, (38 U.S.C. 2012), and the Rehabilitation Act, as amended, (29 U.S.C. 793), as applicable.

"Administering agency" means any department, agency or establishment in the executive branch of the Government, including any wholly owned Government corporation, which administers a program involving federally assisted construction contracts.

"Administrative complaint" means the pleading which commences an administrative enforcement proceeding under the Order, section 402 or section 503.

"Administrative law judge" means an administrative law judge appointed as provided in 5 U.S.C. 3105 and Subpart B of Part 930 of Title 5 of the Code of Federal Regulations (see 37 FR 16787) and qualified to preside at hearings under 5 U.S.C. 557.

"Affirmative action clause" means the contract clause set forth at 41 CFR 60-250.3 or at 41 CFR 60-741.3, as applicable.

"Agency" means any contracting or any administering agency of the Government.

"Applicant" means a person applying for Federal assistance involving, or which results in, a construction contract or a person who has received such assistance. "Applicant" also means a person who is seeking employment or who has sought employment with a contractor.

"Assistant Secretary" means the Assistant Secretary of Labor for Employment Standards or his/her designee.

"Complaint" means a charge filed with OFCCP by an employee, former employee, applicant for employment or by a third party alleging discriminatory employment practices under the Order, or under section 402 or section 503.

"Construction work" means the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.

"Contract" means any Government contract or subcontract, and with respect to the Order, any federally-assisted construction contract or subcontract. The regulations in this chapter frequently refer only to contract. The word subcontract is subsumed under the word contract.

"Contracting agency" means any department, agency, establishment, or instrumentality in the executive branch of the Government, including any wholly owned Government corporation, which enters into contracts.

"Contractor" means a Government contractor or subcontractor, and with respect to the Order, a federally-assisted construction contractor or subcontractor. For the purpose of Subpart B of this part and Part 60-30 of this chapter the term also includes any person who has held a contract. The regulations in this chapter frequently refer only to contractor. The word subcontractor is subsumed under the word contractor.

"Director" means the Director of the Office of Federal Contract Compliance Programs of the United States Department of Labor or his/her designee.

"Disabled veteran" means a person entitled to disability compensation under laws administered by the Veterans Administration for disability rated at 30 per centum or more, or a person whose discharge or release from active duty was for a disability incurred or aggravated in the line of duty.

"Establishment," except as used in the definition of "administering agency" and "contracting agency" contained in this section, means the location of a contractor's business or operations generally having some component which exercises personnel authority and responsibilities. Small locations (i.e., those having fewer than 50 employees) may be considered to be part of an establishment in a different location if such locations are in the same Standard Metropolitan Statistical Area or labor area and are within the same chain of command.

"Equal opportunity clause" means the contract provisions set forth in section 202 of the Order, and in § 60-1.4(a) or (b), as appropriate.

"Facilities" means buildings, structures, equipment, roads, walks, parking lots or other real or personal property.

"Federally assisted construction contract" means any agreement or modification thereof between any applicant and a person for construction work which is paid for in whole or in part with funds obtained from the Government or borrowed on the credit of the Government pursuant to any Federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the Government for a grant, contract, loan insurance, or guarantee under which the applicant itself participates in the construction work.

"Government" means the Government of the United States of America.

"Government contract" means any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements. But sections 402 and 503 do not apply to contracts for the use of real property. The term "services", as used in this section includes, but is not limited to the following services: Utility, construction, transportation, research, insurance, and fund depository, irrespective of whether the Government is the purchaser or seller. The term "Government contract" does not include (1) agreements in which the parties stand in the relationship of employer and employee and (2) federally assisted construction contracts.

"Handicapped individual" means any person who (a) has a physical or mental impairment which substantially limits one or more of the person's major life activities; (b) has a record of such impairment; or (c) is regarded as having such an impairment. A handicapped individual is "substantially limited" if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of a real or perceived handicap. For purposes of this chapter, "major life activities" includes employment or training. "Regarded as" means the employer perceives the individual as having an impairment whether or not there is an impairment.

"Modification" means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

"Order," "Executive Order," or "Executive Order 11246" means parts II, III, and IV of Executive Order 11246 dated September 24, 1965 (30 FR 12319), any Executive Order amending such Order, and any other Executive Order superseding such Order. Order specifically includes the equal opportunity clause and the rules, regulations and orders issued pursuant to the Order. The short form reference of Order is used simply to avoid needless repetition of the above phrases.

"Person" means any natural person, corporation, partnership, unincorporated association, state or local government, and any agency, instrumentality, or subdivision of such a government.

"Prime contractor" means any person holding a contract and, for the purposes of Subpart B of this part and 41 CFR Part 60-30, any person who has held a contract subject to the Order or to sections 402 and 503.

"Qualified disabled veteran" means a disabled veteran as defined in this section 60-1.3 who is capable of performing a particular job, with reasonable accommodation to his or her handicap or disability.

"Qualified handicapped individual" means a handicapped individual capable of performing a particular job with reasonable accommodation to his or her handicap or disability.

"Recruiting and training agency" means any person who refers workers to any contractor or who provides for employment by any contractor.

"Rules, regulations, and relevant orders of the Secretary of Labor" used in paragraph (4) of the equal opportunity clause means rules, regulations, and relevant orders of the Secretary of Labor or his/her designee issued pursuant to the Order.

"Secretary" means the Secretary of Labor, U.S. Department of Labor.

"Section 503" means section 503 of the Rehabilitation Act, as amended. The reference, section 503, specifically includes rules and regulations promulgated pursuant to the Act.

"Section 402" means section 402 of the Vietnam Era Veterans' Readjustment Assistant Act, as amended. The reference, section 402, specifically includes rules and regulations promulgated pursuant to the Act.

"Site of construction" means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair and any temporary location or facility at which a contractor or other participating party meets a demand or performs a function relating to the contract.

"Subcontract" means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed: *Provided,* That sections 402 and 503 do not apply to contracts relating to real property.

"Subcontractor" means any person holding a subcontract and, for the purposes of Subpart B of this part, any person who has held a subcontract subject to the Order. The term "First-tier subcontractor" refers to a subcontractor holding a subcontract with a prime contractor.

"United States" means the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, the Panama Canal Zone, American Samoa and the Trust Territory of the Pacific Islands.

"Veteran of the Vietnam Era" means a person (a) who (1) served on active duty for a period of more than 180 days, any part of which occurred between August 5, 1964, and May 7, 1975, and was discharged or released therefrom with other than a dishonorable discharge, or (2) was discharged or released from active duty for a service-connected disability if any part of such active duty was performed between August 5, 1964, and May 7, 1975, and (b) who was so discharged or released within 48 months preceding the alleged violation of the Act.

[45 FR 86228, Dec. 30, 1980; 46 FR 7333, Jan. 23, 1981]

§ 60-1.4 Equal opportunity clause.

(a) *Government contracts.* Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the Order in each of its Government contracts (and modifications thereof if not included in the original contract):

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractors will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting offi-

ing forth the provisions of this nondiscrimination clause.

(2) The contractor will in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) the contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applications for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) the contractor will include the provisions of paragraphs (1) thorugh (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* that in the event the contractor becomes involved in, or is threatened with litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(b) *Federally assisted construction contracts.* Except as otherwise provided, each administering agency shall require the inclusion of the following language as a condition of any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of the equal opportunity clause:

The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex; or national origin. The contractor will take affirmative action ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin, such action shall include, but not be limited to the following: Employment, upgrading demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representative of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* That in the event a contractor becomes involved in or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: *Provided,* That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for Government contracts and federally assisted construction contracts pursuant to the Executive order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee), refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

(c) *Subcontracts.* Each nonexempt contractor or subcontractor shall include the equal opportunity clause in each of its nonexempt subcontracts.

NOTE: See, also, § 60-1.46 and § 60-1.47 regarding incorporation by reference and incorporation by operation of law, respectively.

[45 FR 86228, Dec. 30, 1980; 46 FR 7333, Jan. 23, 1981]

§ 60-1.5 Exemptions.

(a) *General*—(1) *Transactions of $10,000 or under.* Contracts not exceeding $10,000, other than (i) Government bills of lading and (ii) contracts with financial institutions which serve as depositories of Government funds in any amount, or which serve as issuing or redeeming agents for U.S. savings bonds and savings notes or which subscribe to Federal deposit or share insurance, are exempt from the re-

quirements of the Order. In determining the applicability of this exemption to any federally assisted construction contract, the amount of such contract rather than the amount of the Federal financial assistance shall govern. No agency or contractor shall procure supplies or services in a manner so as to avoid applicability of the order: *Provided*, That where a contractor has contracts with the Government in any 12-month period which have an aggregate total value (or can reasonably be expected to have an aggregate total value) exceeding $10,000, the $10,000 or under exemption does not apply, and the contracts are subject to the order regardless of whether any single contract exceeds $10,000.

(2) *Contracts for indefinite quantities.* With respect to contracts for indefinite quantities (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, "call-type" contracts, and purchase notice agreements), the equal opportunity clause shall be included unless the purchaser has reason to believe that the amount to be ordered in any year under such contract will not exceed $10,000. The applicability of the equal opportunity clause shall be determined by the purchaser at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall be applied to such contract whenever the amount of a single order exceeds $10,000. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) *Work outside the United States.* Contracts are exempt from the requirements of the equal opportunity clause with regard to work performed outside of the United States by employees who were not recruited within the United States.

(4) *Contracts with state or local governments.* The Order, and sections 402 and 503, with respect to a contract with a state or local government (or any agency thereof) shall apply only to the agency or agencies of such government which perform on the contract. Agencies, instrumentalities or subdivisions of state or local governments, except educational institutions, utilities, and medical facilities, are exempt from filing the annual compliance report required by § 60-1.7(a)(1) of this part and from maintaining a written affirmative action program prescribed by § 60-1.40 of this part and Part 60-2 of this chapter.

(5) *Contracts with certain educational institutions.* It shall not be a violation of the equal opportunity clause for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion. The primary thrust of this provision is directed at religiously oriented church-related colleges and universities and should be so interpreted.

(6) *Work on or near Indian reservations.* It shall not be a violation of the equal opportunity clause for a contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. The use of the word "near" would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such a preference shall not excuse a contractor from complying with the other requirements contained in this chapter.

(b) *Specific contracts and facilities*—(1) *Specific contracts.* The Director may exempt an agency or any person from requiring the inclusion of any or

all of the equal opportunity clause in any specific contract or subcontract when he/she deems that special circumstances in the national interest so require. The Director may also exempt groups or categories of contracts or subcontracts of the same type where he/she finds it impracticable to act upon each request individually or where group exemptions will contribute to convenience in the administration of the Order.

(2) *Facilities not connected with contracts.* The Director may exempt from the requirements of the equal opportunity clause any of a contractor's facilities which he/she finds to be in all respects separate and distinct from activities of the contractor related to the performance of the contract, provided that he/she also finds that such an exemption will not interfere with or impede the effectuation of the Order.

(c) *National security.* Any requirement set forth in the regulations in this part shall not apply to any contract whenever the head of an agency determines that such contract is essential to the national security and that its award without complying with such requirement is necessary to the national security. Upon making such a determination, the head of the agency will notify the Director in writing within 30 days.

(d) *Withdrawal of exemption.* When any contract is of a class exempted under this section, the Director may withdraw the exemption for a specific contract or group of contracts when in his/her judgment such action is necessary or appropriate to achieve the purposes of the Order. Such withdrawal shall not apply to contracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

§ 60-1.6 [Reserved]

§ 60-1.7 Reports and other required information.

(a) *Requirements for contractors.* (1) Each contractor shall file annually, on or before the 31st day of March, complete and accurate reports on Standard Form 100 (EEO-1) promulgated jointly by the Office of Federal Contract Compliance Programs and the Equal Employment Opportunity Commission or such form as may hereafter be promulgated in its place if such contractor (i) has 50 or more employees; and has a contract of $50,000 or more; or (ii) has contracts which total $50,000 or more, or which reasonably may be expected to total $50,000 or more, in any 12-month period; or (iii) is a financial institution which serves as a depository for Government funds in any amount, acts as an issuing or redeeming agent for U.S. savings bonds and notes in any amount, or subscribes to federal deposit or share insurance.

(2) Each contractor required by § 60-1.7(a)(1) to submit reports shall file such report within 30 days after the award to it of a contract unless such contractor has submitted such a report within 12 months preceding the date of the award. Subsequent reports shall be submitted annually in accordance with § 60-1.7(a)(1), or at such other intervals as the Director may require. The Director may extend the time for filing any report.

(3) The Director or the applicant, on their own motions, may require a contractor to keep employment or other records and to furnish, in the form requested, within reasonable limits, such information as the Director or the applicant deems necessary for obtaining compliance under the Order.

(4) Failure to file timely, complete and accurate reports as required constitutes noncompliance with the contractor's obligations under the Order and is ground for the imposition of any sanction authorized by the Order.

(b) *Requirements for bidders or prospective prime contractors* (1) *Certification of compliance with Part 60-2; Affirmative Action Programs.* Each contracting agency shall require each bidder or prospective prime contractor

to state in the bid or in writing at the outset of negotiations for the contract: (i) Whether it has developed and has on file at each establishment affirmative action programs pursuant to Part 60-2 of this chapter; (ii) whether it has participated in any previous contract or subcontract subject to the Order; and (iii) whether it has filed with the Joint Reporting Committee, the Director or the Equal Employment Opportunity Commission all reports due under the applicable filing requirements.

(2) *Additional information.* A bidder or prospective prime comtractor shall be required to submit such information as the Director requests prior to the award of the contract. When a determination has been made to award the contract to a specific contractor, such contractor shall be required, prior to award, or after the award, or both, to furnish such other information as the applicant or the Director requests.

§ 60-1.8 Segregated facilities.

To comply with its obligations under the Order, a contractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex or national origin cannot result. The contractor may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. This obligation extends to all contracts regardless of the amount of the contract. The term "facilities" as used in this section means waiting rooms, work areas, restaurants, and other eating areas, time clocks, restrooms, wash rooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees: *Provided,* That separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.

§ 60-1.9 Compliance by labor unions and by recruiting and training agencies.

(a) The policy of OFCCP is to use its best efforts, directly and through agencies, contractors, applicants, state and local officials, public and private agencies, and all other available instrumentalities, to cause any labor union, recruiting and training agency or other representative of workers who are or may be engaged in work under contracts to cooperate with, and to comply in the implementation of, the purposes of the Order and of sections 402 and 503.

(b) To effectuate the purposes of paragraph (a) of this section, the Director may hold hearings, public or private, with respect to the practices and policies of any such labor union or recruiting and training agency.

(c)(1) The collective bargaining representatives shall be given written notice of the commencement of any on site investigation of compliance with the Executive Order or with section 402 or 503 at the same time the contractor is notified.

(2) Whenever compliance with the Order or with section 402 or 503 affects the terms or conditions of employment which are governed by the provisions of a collective bargaining agreement, the collective bargaining representatives shall be given notice and an opportunity to present their positions and supporting evidence to OFCCP and shall be invited to participate in conciliation discussions to the extent those discussions relate to any proposed changes in the collective bargaining agreement, prior to any resolution or agreement between OFCCP and the contractor relating to such matters. (See 41 CFR 60-1.25(e).)

(d) The Director may notify any Federal, state or local agency of his/her conclusions and recommendations with respect to any such labor organization or recruiting and training agency which in his/her judgment has failed to cooperate with OFCCP, agencies, contractors or applicants in carrying out the purposes of the Order or of sections 402 and 503. The Director also may notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies when there is reason to believe that the practices of any such labor organization or agency violate Title VII of the Civil Rights Act of 1964 or other provisions of Federal law.

[45 FR 86228, Dec. 30, 1980; 46 FR 7333, Jan. 23, 1981]

§ 60-1.10 Foreign government practices.

Contractors shall not discriminate on the basis of race, color, religion, sex, or national origin when hiring or making employee assignments for work to be performed in the United States or abroad. Contractors are exempted from this obligation only when hiring persons outside of the United States for work to be performed outside of the United States (see 41 CFR 60-1.5(a)(3)). Therefore, a contractor hiring workers in the United States for either Federal or nonfederally connected work shall be in violation of Executive Order 11246, as amended, by refusing to employ or assign any person because of race, color, religion, sex, or national origin regardless of the policies of the country where the work is to be performed or for whom the work will be performed. Should any contractor be unable to acquire a visa of entry for any employee or potential employee to a country in which or with which it is doing business, and which refusal it believes is due to the race, color, religion, sex, or national origin of the employee or potential employee, the contractor must immediately notify the Department of State and the Director of such refusal.

Subpart B—General Enforcement; Review and Complaint Procedure

§ 60-1.20 Compliance reviews.

(a) The purpose of a compliance review is to determine if the contractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, terminated, and otherwise treated during employment without regard to race, color, religion, sex, national origin, veteran status or handicap. It shall consist of a comprehensive analysis and evaluation of each aspect of the aforementioned practices and policies and conditions resulting therefrom. Compliance reviews normally are conducted in three stages (desk audit, on-site review and off-site analysis). The desk audit may be shortened or omitted, however, when an immediate on-site review (e.g., where a preaward compliance review is involved, where intimidation is alleged or other circumstances do not permit a desk audit) is required. (See, 41 CFR 60-1.24(b).)

(b) Compliance reviews generally are conducted under the direction of an OFCCP Assistant Regional Administrator, but the Director is authorized to designate other OFCCP officials for this purpose.

(c) Where deficiencies or violations are found, reasonable efforts shall be made to secure compliance through conciliation and persuasion. Before the contractor can be found to be in compliance with the Order, section 402 or section 503, it must make a specific commitment, in a written conciliation agreement or a letter of commitment, as appropriate, to correct any such deficiencies or violations. Minor technical deficiencies usually may be resolved in a letter of commitment from the contractor. The agreement or letter must include the precise actions to be taken and dates for completion. The time period allotted shall be no longer than the minimum period necessary to effect such changes. Upon approval by OFCCP, the contractor may be considered in compliance, on condition that the actions are faithfully taken. The contractor shall be notified, however, that taking such actions does not preclude future determinations of noncompliance based either on a finding that the actions are not sufficient to achieve compliance or on violations not previously revealed in a compliance review or complaint investigation.

§ 60-1.21 Preaward reviews.

(a) The purpose of a preaward compliance review is to determine whether a responsive contractor or bidder will be able to comply with the requirements of the Order and with sections 402 and 503.

(b) Each contracting agency shall include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated non-

construction contract, that if the award, when let, should exceed $1 million, the prospective contractor and known first-tier subcontractors with subcontracts in excess of $1 million will be subject to a compliance review before the award of the contract.

(c) Prior to the award of any nonconstruction contract in excess of $1 million, the contracting agency shall give written notice of the proposed award to the OFCCP Assistant Regional Administrator of the Region in which the contract is to be performed as far in advance of the award date as possible. In any event, the notice shall be given no less than 45 days in advance of the award date. The notice shall identify the projected prime contractor and all known first-tier subcontractors or prospective subcontractors projected to receive subcontracts in excess of $1 million.

(d) If the establishment where the contract or subcontract is to be performed has 250 or more employees and no compliance review of that establishment has been conducted in the 24 months prior to the notification, a compliance review of the establishment shall be commenced on a priority basis.

(e) OFCCP is authorized to conduct preaward compliance reviews of any contractor receiving a contract in excess of $1 million even though the establishment has less than 250 employees and a compliance review has been conducted within the last 24 months. In determining whether to conduct a preaward review under this paragraph (e), OFCCP may consider, for example, (1) the past EEO performance of the contractor, including its current EEO profile and indications of underutilization; (2) the volume and nature of complaints filed by employees or applicants against the contractor; (3) whether the contractor is in a growth industry; (4) the level of employment or promotional opportunities resulting from the expansion of or turnover in the contractor's work force; (5) the employment opportunities likely to result from the contract in issue; and (6) whether resources are available to conduct the review.

(f) If, prior to the award date of the contract or subcontract, the contracting agency has not provided the notice required by paragraph (c) of this section, the preaward compliance review has not been completed or the contractor-bidder's alleged noncompliance has not been resolved, the Director may request the contracting agency to delay the award of the contract, until such time as the contractor is found eligible or ineligible for the contract in accordance with the preliminary hearing procedures in 41 CFR 60-30.38 of this chapter. The request shall also be applicable to all other contracts which are then (or become) pending at the establishment where the preaward review which triggered the request was conducted. The request shall not be applicable to contracts pending at other establishments which are not part of the preaward review. If such a request is made, the award of the contract(s) shall be delayed, unless the contracting agency determines that a delay is contrary to the national security of the United States. Written notification of such determination shall be given to the Director within 30 days of the determination (see 41 CFR 60-1.5(c)): *Provided*, That unless the preliminary hearing procedures in 41 CFR 60-30.38 have been invoked or will be invoked within 15 working days, Executive Order, and sections 402 and 503 clearance for award of the contract shall not be withheld.

(g) The preaward review authorized by this section shall be conducted in accordance with the procedures of § 60-1.20 of this part to the extent that those procedures are not inconsistent with the provisions of this section.

(h) If by the award date, the preaward compliance review has not been completed or a decision to invoke the preliminary hearing procedure in 41 CFR 60-30.38 of this chapter has not been made, Executive Order, and sections 402 and 503 clearance for the contract shall be granted, except as provided in paragraph (f) of this section, and the review shall be completed on an expedited basis.

§ 60-1.22 Filing complaints.

Complaints shall be filed within 180 days of the alleged violation unless the

time for filing is extended by the Director for good cause shown. Complaints may be filed with the OFCCP, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, or with any OFCCP regional or area office.

§ 60–1.23 Contents of complaint.

(a) The complaint shall include the name, address, and telephone number of the complainant, the name and address of the contractor committing the alleged discrimination, a description of the acts considered to be discriminatory, and any other pertinent information which will assist in the investigation and resolution of the complaint. The complaint shall be signed by the complainant or his/her authorized representative. Signed third party complaints which allege class-type discrimination and which do not identify the alleged discriminatees will be accepted, whether or not the third party signing the complaint is an authorized representative, provided that the other information required by this paragraph is included.

(b) If a complaint contains incomplete information, OFCCP shall seek the needed information from the person filing the complaint. In the event such information is not furnished within 60 days of the date of such request, the case may be closed.

§ 60–1.24 Processing complaints.

(a) *Complaints.* OFCCP may refer individual complaints to the Equal Employment Opportunity Commission (EEOC) for processing under Title VII of the Civil Rights Act of 1964, as amended, in lieu of processing them under the Order. Upon referring a complaint to the EEOC, OFCCP shall promptly notify the complainant. OFCCP also may transmit a copy of any complaint to EEOC and to any state or local agency with jurisdiction over the subject of the complaint.

(b) *Complaint investigations under the Order.* (1) OFCCP will retain and investigate class or systemic complaints. However, where EEOC is about to initiate or is in the process of an investigation of any contractor against which OFCCP has received a class complaint, OFCCP may, at the request of EEOC, refer the complaint to EEOC for processing in order to avoid duplication and to assure effective law enforcement. In resolving such class complaints, the agencies will consult and coordinate with each other to ensure that the resolution of the complaints comports with the law enforcement requirements of each agency.

(2) During a compliance review, OFCCP will investigate and resolve individual complaints on file with OFCCP and unresolved at the commencement of the compliance review: *Provided,* That resolution of such individual complaints does not unduly delay the completion of the compliance review. With regard to unresolved individual complaints which have been referred to EEOC, OFCCP will consult with EEOC at the commencement of the compliance review to determine whether EEOC or OFCCP will investigate and resolve such complaints.

(c) *Resolution of matters.* (1) If any complaint investigation indicates a violation of the Order, reasonable efforts shall be made to secure compliance through conciliation and persuasion. (2) Where any complaint investigation indicates a violation of the Order and the matter has not been resolved by informal means, the matter may be referred to the Office of the Solicitor for consideration of legal enforcement proceedings.

[45 FR 86228, Dec. 30, 1980; 46 FR 7333, Jan. 23, 1981]

§ 60–1.25 Show cause notices and notices of violation.

(a) *General Rule.* At the conclusion of a compliance review or complaint investigation conducted pursuant to the Order or sections 402 and 503, a notice to show cause or a notice of violation shall be served on the contractor if the deficiencies which were disclosed in the review or investigation have not been corrected through a conciliation agreement, letter of commitment or consent decree. Where appropriate, show cause notices may be used at any other stage of the review.

(b) *Show cause notices—exceptions to the general rule.* A notice to show

cause why enforcement proceedings should not be initiated shall be used when an uncorrected deficiency is disclosed in a compliance review or complaint investigation, except when: (1) A notice of violation under paragraph (d) of this section is appropriate; (2) a violation of a conciliation agreement under paragraph (f) of this section is alleged; (3) one or more special violations as discussed in § 60-1.29(d) of this part is alleged; or (4) OFCCP contemplates judicial enforcement under § 60-1.29(f) of this part.

(c) *Show cause notices—contents and timeframes.* (1) A notice to show cause should contain:

(i) An itemization of the sections of the Order, sections 402 and 503, and of the regulations with which the contractor has been found in violation, with a description of the conditions, practices, facts, or circumstances which give rise to each violation;

(ii) A statement of the corrective actions proposed by OFCCP to achieve compliance;

(iii) A request for a written response to the findings, including commitments to corrective actions or the presentation of opposing facts and evidence; and

(iv) A suggested date for the conciliation conference.

(2) The contractor shall be accorded 30 days, or such longer period as may be authorized by the Director or his/her designee, to establish that it is not covered by or is in compliance with the Order and sections 402 and 503, or to enter into a conciliation agreement or letter of commitment.

(d) *Notice of Violation.* (1) A notice of violation may be used where circumstances do not permit 30 days to resolve the matters (e.g. pre-award compliance reviews), and may be used at any time during the compliance review or complaint investigation (e.g. where serious violations such as intimidation, or interference with the orderly process of the review or investigation are alleged). A notice of violation shall contain a short and plain statement of the deficiency adequate to put the contractor on notice of the violation with which it is charged. The notice shall accord the contractor a reasonable period of time (not to exceed 15 days) in which to respond and for conciliation.

(2) A notice of violation also may be used when the compliance review or complaint investigation discloses a violation of a matter which is the subject of a conciliation agreement, letter of commitment or consent or other decree between the contractor and the Department of Labor, the Attorney General acting on behalf of OFCCP, or a former compliance agency (see 41 CFR 60-1.25(b)).

(e) *Participation by collective bargaining representatives.* When a notice to show cause or a notice of violation proposes a change in the terms or conditions of employment which are governed by the provisions of a collective bargaining agreement the collective bargaining representatives shall be given notice of the proposed change and an opportunity to present their positions and supporting evidence to OFCCP and shall be invited to participate in conciliation discussions to the extent those discussions relate to such changes, prior to any resolution or agreement between OFCCP and the contractor relating to such matters.

(f) *Procedure when a conciliation agreement is violated.* When a conciliation agreement has been violated, the following procedures are applicable: (1) A written notice shall be sent to the contractor setting forth the violations alleged and summarizing the supporting evidence. The contractor shall have 15 days from receipt of the notice to respond, except in those cases in which such a delay would result in irreparable injury to the employment rights of affected employees or applicants.

(2) During the 15-day period the contractor may demonstrate in writing that it has not violated its commitments.

(3) If the contractor is unable to demonstrate that it has not violated its commitments, or if the notice alleges irreparable injury, enforcement proceedings may be initiated immediately without issuing a show cause notice or proceeding through any other requirement contained in this chapter.

§ 60-1.26 Conciliation agreements.

(a) A conciliation agreement is a written agreement between OFCCP and a contractor by which the contractor undertakes specific obligations to correct or remedy noncompliance with the Order or with sections 402 and 503. A conciliation agreement normally is required where a compliance review, complaint investigation or some other review discloses violations of the Order or of sections 402 and 503, and (1) the contractor is willing to correct the violations or deficiencies and (2) OFCCP determines that a settlement (rather than formal enforcement) is appropriate. The agreement shall provide for the remedial relief necessary to correct the violations or deficiencies, which may include priority rights to hire or promotion, training, back pay, front pay and retroactive seniority, etc., for an affected class or for individuals, as appropriate.

(b) A conciliation agreement shall include (1) A statement of each deficiency or violation; (2) the corresponding precise remedial action to be taken and a timetable for implementation; (3) a requirement for periodic reporting to OFCCP as to implementation of the agreement, if appropriate; and (4) a copy of the notice to show cause or notice of violation when such has been previously issued.

(c) A conciliation agreement is effective when it has been signed by the contractor and the proper Assistant Regional Administrator, OFCCP, unless within 45 days of receipt from the Assistant Regional Administrator, the Director rejects the agreement.

(d) Conciliation agreements shall not be entered into after enforcement proceedings have been initiated. Settlements of enforcement proceedings by the Office of the Solicitor normally will be by consent decree.

(e) Letters of commitment, in lieu of conciliation agreements, are appropriate for resolving minor technical deficiencies.

§ 60-1.27 Assumption of jurisdiction by the Director.

(a) The Director may inquire into the status of any pending matter. Where the Director considers it necessary or appropriate to the achievement of the purposes of the Order or of sections 402 and 503, he/she may assume jurisdiction over the matter and proceed as provided in this chapter. Whenever the Director assumes jurisdiction over any matter, he/she may conduct, or have conducted, such investigation, hold such hearings, including record hearings, and hearings under § 60-1.9(b) of this part, make such findings, issue such recommendations and directives and take such other action as may be necessary or appropriate to achieve the purposes of the Order or of sections 402 and 503.

(b) For reasonable cause shown, the Director may, on his/her own motion or pursuant to a request, reconsider or cause to be reconsidered a matter arising under the Order or under sections 402 and 503 which presently is pending in OFCCP.

§ 60-1.28 Intimidation and interference.

The sanctions and penalties contained in Subpart D of the Order, and in Parts 60-250 and 60-741 of this chapter may be exercised against any contractor or applicant which fails to take all necessary steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in an investigation, compliance review, hearing, or any other activity related to the administration of the Order, sections 402 and 503 or any other Federal, state or local laws requiring equal employment opportunity. Such sanctions and penalties also apply to contractors or applicants which discriminate against a person because he or she has opposed any employment practice unlawful under the Order, sections 402 and 503, Title VII of the Civil Rights Act of 1964, as amended, or any other Federal, state or local laws.

§ 60-1.29 Enforcement proceedings.

(a) *General.* If, as a result of a compliance review, complaint investigation or some other review, OFCCP believes that the Order or that sections 402 and 503 have been violated, the matter may be referred to the Office of the

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Solicitor for consideration of legal enforcement proceedings.

(b) *Violations.* Violations may be found based upon, *inter alia*, any of the following: (1) the results of a compliance review or complaint investigation; (2) analysis of an affirmative action program; (3) the results of an on-site review of the contractor's compliance with the Order or of sections 402 and 503; (4) a contractor's refusal or failure to submit an affirmative action program; (5) a contractor's refusal or failure to permit an on-site compliance review or complaint investigation to be conducted; (6) a contractor's refusal or failure to maintain records and other information, or to supply copies of such records or information required to be maintained or supplied by the Order or by sections 402 and 503; and (7) any substantial or material violation of the contractual provisions of the Order or of the regulations implementing sections 402 and 503.

(c) *Administrative enforcement proceedings.* Administrative enforcement proceedings are brought by the Office of the Solicitor and shall be conducted under the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246, Section 402 and Section 503 contained in Part 60-30 of this chapter. Administrative enforcement proceedings may be commenced to enjoin violations of the Order or of sections 402 and 503, to seek appropriate relief (which may include back pay, front pay, retroactive seniority, training, priority rights to hire or promotion, etc., for an affected class or for individuals) or to impose sanctions.

(d) *Special violations.* If the contractor refuses or fails to (1) submit an affirmative action program; (2) supply copies of relevant records or other requested information; (3) allow OFCCP access to its premises for an on-site review or investigation; or if the contractor is being charged with intimidation or interference under § 60-1.28 of this part, and if conciliation efforts under this part are unsuccessful, administrative enforcement proceedings may be commenced without serving the contractor with a show cause notice or a notice of violation.

(e) *Preliminary administrative enforcement proceedings.* Preliminary or summary enforcement proceedings under 41 CFR 60-30.38 may be appropriate when the evidence indicates one or more of the following violations of the Order, section 402 or section 503: (1) The contractor is engaging in employment practices which violate its contractual obligations so as to make the contractor not responsible to perform its contractual EEO obligations (such as, where a preaward or other compliance review discloses evidence that the contractor is engaging in prohibited employment practices and the contractor has failed to change the practices); (2) the contractor has refused or failed to develop or submit a current affirmative action program; (3) the contractor has failed or refused to supply requested records or other information it is required to supply; (4) the contractor has failed or refused to permit access to its premises, to its records for reviewing or copying or to its employees or witnesses for interviewing or questioning during an on-site review or investigation; (5) the contractor has engaged in intimidation or retaliation in violation of § 60-1.28 of this part. Preliminary enforcement proceedings involving one or more such violations may be commenced by the Office of the Solicitor, and shall be conducted pursuant to the rules of practice for such proceedings under Part 60-30 of this chapter.

(f) *Judicial enforcement—referrals to the Department of Justice.* (1) Violations of the Order or section 402 or 503 or the threat of violations of the Order or section 402 or 503 may be referred to the Department of Justice for judicial enforcement. There are no procedural prerequisites to a referral to the Department of Justice.

(2) Whenever a matter has been referred to the Department of Justice for consideration of judicial proceedings, the Attorney General may bring a civil action against the contractor or any other person in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional equitable relief, including back pay, deemed necessary or appropriate

to ensure the full enjoyment of the rights secured by the Order or section 402 or 503, or any of the above.

(3) The Attorney General is authorized to conduct such investigation of the facts as he/she may deem necessary or appropriate to carry out his/her responsibilities under these regulations.

(4) Prior to the institution of any judicial proceedings, the Attorney General, on behalf of the Director, is authorized to make reasonable efforts to secure compliance with the contract provisions of the Order or of the regulations implementing sections 402 and 503. He/she may do so by providing the contractor and any other person with reasonable notice of findings, his/her intent to file suit, and the actions he/she believes necessary to obtain compliance with the contractual provisions of the Order or of the regulations implementing sections 402 and 503 without contested litigation, and by offering the contractor and any other person a reasonable opportunity for conference and conciliation, in an effort to obtain such compliance without contested litigation.

(5) As used in this part, the Attorney General shall mean the Attorney General, the Assistant Attorney General for Civil Rights, or any other person authorized by regulations or practice to act for the Attorney General with respect to the enforcement of equal employment opportunity laws, orders and regulations generally, or in a particular matter or case.

(g) *Recommendations to the Attorney General for investigation and possible suit.* In addition to recommending that suit be instituted upon referral under 41 CFR 60-1.29(f) above, the Department of Labor may recommend that the Attorney General conduct further investigation of a contractor to determine whether there are substantial violations of the Order, section 402, section 503 or other contractual obligations assumed by the contractor that warrant the initiation of a lawsuit. Upon doing so the Department of Labor shall promptly notify the contractor of that recommendation. Upon receipt of such a recommendation the Attorney General is authorized to take any action, with respect to a contractor, which is authorized by a referral under 41 CFR 60-1.29(f) above.

(h) *Referrals to the Equal Employment Opportunity Commission.* The Department of Labor may recommend that the Equal Employment Opportunity Commission institute appropriate proceedings under Title VII of the Civil Rights Act of 1964. In addition, and where appropriate, the Department of Labor will make such recommendations to the EEOC in connection with alleged violations by financial institutions whose only nexus to the Federal Government is Federal deposit or share insurance.

(i) *Referrals to financial institution regulatory agencies.* Where appropriate, the Department of Labor may refer alleged violation of the Order, section 402 or section 503 by financial institutions to the appropriate Federal financial institutions regulatory agency for actions under that agency's procedures. Whenever the Department of Labor refers a violation by a financial institution to the appropriate regulatory agency, the agency, after consultation with the Department of Labor, may take such action, in its sole discretion, as it deems appropriate. These agencies are: (1) Federal Home Loan Bank Board; (2) Federal Deposit Insurance Corporation; (3) Comptroller of the Currency; (4) the Board of Governors of the Federal Reserve System; and (5) the National Credit Union Administration

(j) *Enforcement policy regarding Federal deposit and share insurance.* The Department of Labor will not debar financial institutions (e.g., banks, savings and loan associations and credit unions) from future Federal deposit or share insurance, or cancel, terminate or suspend existing Federal deposit or share insurance. In the event that a financial institution which has Federal deposit or share insurance is alleged to be in violation of its contractual commitments under the Executive Order, section 402 or section 503, the Department of Labor will pursue one of the options mentioned in paragraphs (f), (h) and (i) of this section with respect to the deposit or share insurance relationship. Such recommendations or referrals as de-

scribed in paragraphs (f), (h) and (i) of this section may take place without or after an administrative hearing in the Department of Labor.

[45 FR 86228, Dec. 30, 1980; 46 FR 7333, Jan. 23, 1981]

§ 60-1.30 Debarment and contract ineligibility list.

No order for debarment from further Government contracts or subcontracts pursuant to section 209(a)(6) of the Order or pursuant to the regulations implementing sections 402 and 503 shall be made without affording the contractor an opportunity for a hearing, either administrative or judicial. The Director periodically shall distribute a list to all executive departments and agencies giving the names of contractors which have been declared ineligible under the Order or under sections 402 and 503 for further Government contracts and subcontracts. The Director shall promptly notify the Comptroller General of the United States when contracts have been cancelled or terminated or when a contractor has been debarred from further Government contracts under the Order or under sections 402 and 503. The Director shall take appropriate steps to notify prime contractors of the debarred contractor's ineligibility for subcontracts.

§ 60-1.31 Petition for reinstatement for debarred contractors.

(a) Any contractor declared ineligible under the Order or under section 402 or 503 for further contracts may petition the Director for reinstatement. A copy of the petition for reinstatement shall be served on the parties to the original proceeding which led to the debarment. The petition for reinstatement shall set forth what actions the contractor has taken to comply, as applicable, with the Order, section 402 or section 503 and in what way the contractor will comply with requirements which may involve future performance. The burden shall be on the contractor to demonstrate that it is entitled to reinstatement.

(b) Rescission of the debarment order and reinstatement of the contractor's eligiblity for further contracts may be conditioned on the contractor satisfying the Director that it has established and will implement personnel and employment policies in compliance with the provisions of the Order or of section 402 or 503. In carrying out his/her responsibilities under this section, the Director may require that compliance reviews be conducted of the contractor's establishments, and that the contractor supply copies of any information relevant to determining its compliance with the Order or with sections 402 or 503. Reinstatement also may be conditioned on a program of compliance which may include meeting requirements not specifically mentioned in the debarment order where meeting these requirements is necessary to achieve compliance under the Order or under section 402 or 503. Where the debarment was based on a determination of the contractor's liability but the extent of the relief or the number or identity of persons entitled to relief has not been determined or where there are other issues appropriate for hearing, the Director may remand the matter to the Administrative Law Judge for a recommended determination of such issues prior to reinstatement. On remand from the Director, the Administrative Law Judge shall follow the procedures in Part 60-30 of this chapter in making his/her recommended determination or the number of identity of the individuals entitled to relief and the amount of relief. Reasonable discovery shall be allowed on those issues. The matter shall then proceed in accordance with §§ 60-30.25 through 60-30.30 of this chapter. Reinstatement by the Director or Secretary, as applicable, may be conditioned on the contractor's satisfying any relief finally determined by the Secretary or Director, as applicable, to be owed.

(c) Any conditions upon which the recission of the debarment order and reinstatement of the contractor are based shall be set forth by the Director or the Secretary, as appropriate, in an order which shall be filed with the Administrative Law Judge and made a part of the record in the original proceeding from which the debarment resulted. The Administrative Law Judge shall retain jurisdiction, and any sub-

sequent violations involving the same issues which gave rise to the debarment order or which are included in the reinstatement order may be raised by motion in the original proceeding.

(d) The Director's or Secretary's decision on the petition for reinstatement shall constitute a final administrative order.

(e) Any party or person who participated (pursuant to 41 CFR 60-30.24) in the proceeding which gave rise to the debarment order may make submissions opposing or supporting the contractor's petition for reinstatement.

(f) When a debarred contractor is reinstated, the Director shall take prompt action to notify the contractors, Comptroller General and the agencies which received notice of the debarment.

[45 FR 86228, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

Subpart C—Ancillary Matters

§ 60-1.40 Affirmative action programs.

(a) *Requirements of programs.* Each nonconstruction contractor which has 50 or more employees and (1) has a contract of $50,000 or more; or (2) has contracts (including Government bills of lading) which, in any 12-month period total $50,000 or more, or reasonably may be expected to total $50,000 or more; or (3) is a financial institution which serves as a depository for Government funds in any amount, acts as an issuing or redeeming agent for U.S. savings bonds and savings notes in any amount, or subscribes to Federal deposit or share insurance, shall develop a written affirmative action program for each of its establishments. Each nonconstruction contractor shall require each subcontractor which has 50 or more employees and (i) has a subcontract of $50,000 or more; or (ii) has subcontracts (including Government bills of lading) which, in any 12-month period total $50,000 or more, or reasonably may be expected to total $50,000 or more; or (iii) is a financial institution which serves as a depository for Government funds in any amount, acts as an issuing or redeeming agent for U.S. savings bonds and savings notes in any amount, or subscribes to Federal deposit or share insurance, to develop a written affirmative action program for each of its establishments. A necessary prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority and female employment and an evaluation of opportunities for utilization of minority group and female personnel. The contractor's program shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups and women, including, when there is underutilization or other deficiencies, the development of specific goals and timetables for the prompt achievement of full and equal employment opportunity.

(b) *Maintenance of programs.* Contractors currently subject to this section and Part 60-2 of this chapter must have an affirmative action program in place at each establishment. If a contractor is not currently subject to this section and Part 60-2 it must, within 120 days from the commencement of the contract, develop, implement, and maintain separate affirmative action programs for each of its establishments. A copy of the appropriate affirmative action program shall be maintained at each of the contractor's locations. An affirmative action program shall be part of the staffing and training plans for each new establishment and shall be developed and made available prior to the staffing of such establishment. A report of the results of such program shall be compiled annually and the program shall be updated at that time. This information shall be made available to OFCCP upon request and the contractor's affirmative action program and the results it produces shall be evaluated as part of compliance review activities.

(c) *Application to construction contractors.* The provisions of this section 60-1.40 shall be applicable to the nonconstruction employees of a construction contractor which has 50 or more nonconstruction employees and which has (1) a contract of $50,000 or more; or (2) contracts (including Government bills of lading) which, in any 12-

month period total $50,000 or more, or reasonably may be expected to total $50,000 or more.

§ 60-1.41 Solicitations or advertisements for employees.

In solicitations or advertisements for employees placed by or on behalf of a contractor, the requirements of paragraph (2) of the equal opportunity clause shall be satisfied whenever the contractor complies with any of the following:

(a) States expressly in the solicitations or advertising that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin;

(b) Uses display or other advertising, and the advertising includes an appropriate insignia prescribed by the Director. The use of the insignia is considered subject to the provisions of 18 U.S.C. 701;

(c) Uses a single advertisement, and the advertisement is grouped with other advertisements under a caption which clearly states that all employers in the group assure all qualified applicants equal consideration for employment without regard to race, color, religion, sex, or national origin;

(d) Uses a single advertisement in which appears in clearly distinguishable type the phrase "an equal opportunity employer."

§ 60-1.42 Notices to be posted.

(a) Unless alternative notices are prescribed by the Director, the notices which contractors are required to post by paragraphs (1) and (3) of the equal opportunity clause will contain the following language in English and Spanish and will be provided by the contracting or administering agencies:

EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW—DISCRIMINATION IS PROHIBITED BY THE CIVIL RIGHTS ACT OF 1964 AND BY EXECUTIVE ORDER NO. 11246

Private Industry, State, and Local Government

Title VII of the Civil Rights Act of 1964, as amended, prohibits job discrimination because of race, color, religion, sex or national origin.

Applicants to and employees of private employers, state/local governments, and public/private educational institutions are protected. Also covered are employment agencies, labor unions and apprenticeship programs. Any person who believes he or she has been discriminated against should contact immediately:

The U.S. Equal Employment Opportunity Commission (EEOC), 2401 E St. N.W., Washington, D.C. 20506.

Federal Contract Employment

Executive Order 11246, as amended, prohibits job discrimination because of race, color, religion, sex or national origin and requires affirmative action to ensure equality of opportunity in all aspects of employment.

Section 503 of the Rehabilitation Act of 1973 prohibits job discrimination because of handicap and requires affirmative action to employ and advance in employment qualified handicapped workers.

Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 prohibits job discrimination and requires affirmative action to employ and advance in employment (1) qualified Vietnam era veterans during the first four years after their discharge and (2) qualified disabled veterans throughout their working life if they have a 30 percent or more disability.

Applicants to and employees of any company with a Federal Government contract or subcontract are protected. Any person who believes a contractor has violated its affirmative action obligations, including nondiscrimination under Executive Order 11246, as amended or under Section 503 of the Rehabilitation Act, or under Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 should contact immediately:

The Employment Standards Administration, Office of Federal Contract Compliance Programs (OFCCP), Third and Constitution Avenue, N.W., Washington, D.C. 20210 or an OFCCP regional office, listed in most telephone directories under U.S. Government, Department of Labor. Complaints specifically under the veterans' law may also be filed directly with the Veterans' Employment Service through local offices of the state employment service.

All complaints must be filed within 180 days from the date of the alleged violation.

(b) The requirements of paragraph (3) of the equal opportunity clause will be satisfied whenever the contractor posts copies of the notification prescribed by or pursuant to paragraph (a) of this section in conspicuous places available to employees, applicants for employment, and representatives of each labor union or other organization representing its employees

with which it has a collective-bargaining agreement or other contract or understanding.

§ 60-1.43 Access to records and site of employment.

Each contractor shall permit access during normal business hours to its premises for the purpose of conducting on-site compliance reviews which include interviewing employees, inspecting, copying and removing off-site copies of such books, records, accounts, and other material such as computer tapes and printouts as may be relevant to the matter under investigation and pertinent to compliance with the Order or with sections 402 and 503.

§ 60-1.44 Rulings and interpretations.

Rulings under or interpretations of the Order and of sections 402 and 503 shall be made by the Director.

§ 60-1.45 Adaptation of language.

Such necessary changes in language may be made in the equal opportunity clause of the Order and in the affirmative action clauses of sections 402 and 503 as shall be appropriate to identify properly the parties and their undertakings.

§ 60-1.46 Incorporation by reference.

The equal opportunity clause and the affirmative action clauses may be incorporated by reference in all Government contracts and subcontracts, including Government bills of lading, transportation requests, contracts for deposit of Government funds, and contracts for issuing and paying U.S. savings bonds and notes, and such other contracts as the Director may designate.

§ 60-1.47 Incorporation by operation of law.

By operation of the Order and sections 402 and 503, the equal opportunity clause of the Order and the affirmative action clauses of sections 402 and 503 shall be considered to be a part of every contract and subcontract required by the Order and sections 402 and 503 to include such clauses regardless of whether the clauses are physically incorporated into such contracts and regardless of whether the contract is written.

§ 60-1.48 Request for hearing after compliance.

When a contractor, without a hearing, shall have complied with the recommendations or orders of the OFCCP and believes such recommendations or orders to be erroneous, it shall, upon filing a request therefore within 10 days of such compliance, be afforded an opportunity for a hearing and review of the alleged erroneous action. Such hearings normally will be record hearings before the Director.

§ 60-1.49 Existing contracts.

All contracts in effect prior to October 24, 1965, which are not subsequently modified shall be administered in accordance with the nondiscrimination provisions of any prior applicable Executive Orders. Any contract or subcontract modified on or after October 24, 1965, shall be subject to Executive Order 11246. Complaints received by and violations coming to the attention of OFCCP regarding contracts and subcontracts which were subject to Executive Orders 10925 and 11114 shall be processed as if they were complaints regarding violations of Executive Order 11246.

§ 60-1.50 Delegation of authority by the Director.

The Director is authorized to redelegate the authority given to him/her by the regulations in this chapter. The authority redelegated by the Director pursuant to the regulations in this chapter shall be exercised under his/her general direction and control.

PART 60-2—AFFIRMATIVE ACTION PROGRAMS

Subpart A—General

Sec.

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Subpart C—Methods of Implementing the Requirements of Subpart B

60-2.20 Development or reaffirmation of the equal employment opportunity policy.
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Subpart D—Miscellaneous

60-2.30 Use of goals.
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60-2.32 Supersedure.

AUTHORITY: 5 U.S.C. 553(a)(3)(B); 29 CFR 2.7; section 201, E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303, as amended by E.O. 12086.

SOURCE: 45 FR 86239, Dec. 30, 1980, unless otherwise noted.

Subpart A—General

§ 60-2.1 Title, purpose and scope.

(a) The regulations in this part implement provisions of Executive Order 11246 only. This part shall also be known as "Revised Order No. 4" and shall cover nonconstruction contractors. The provisions of this part also shall apply to the nonconstruction employees of a construction contractor with 50 or more nonconstruction employees and one or more contracts which meet the criteria set forth in § 60-1.40 of this chapter. Section 60-1.40 of this chapter, requires that within 120 days from the commencement of a contract each contractor which has 50 or more employees and (1) has a contract of $50,000 or more; or (2) has contracts (including Government bills of lading) which, in any 12-month period, total or can reasonably be expected to total $50,000 or more; or (3) which is a financial institution which (i) serves as a depository of Government funds in any amount; (ii) acts as an issuing or redeeming agent for U.S. savings bonds and savings notes in any amount; or (iii) subscribes to Federal deposit or share insurance, shall develop, implement and maintain a written affirmative action program for each of its establishments. This part sets forth guidelines to be used by contractors and the OFCCP in developing and judging written affirmative action programs as well as the good faith effort required to transform these programs from paper commitments to equal employment opportunity.

(b) Relief, including back pay, where appropriate, for members of an affected class or individuals who by virtue of past discrimination continue to suffer the present effects of that discrimination, shall be provided in the conciliation agreement entered into pursuant to 41 CFR 60-1.26 of this chapter. An affected class problem must be remedied before a contractor may be considered in compliance. Section 60-2.2 of this part, pertaining to an acceptable affirmative action program, also is applicable to a contractor's failure to remedy discrimination against members of an affected class.

§ 60-2.2 Requirements for contractors.

Any contractor required by 41 CFR 60-1.40 of this chapter to develop an affirmative action program at each of its establishments which has not complied fully with that section is not in compliance with the Order. Until such programs are developed and found to be acceptable in accordance with the standards and guidelines set forth in §§ 60-2.10 through 60-2.32 of this part, the contractor is unable to comply fully with the Order. An affirmative action program shall be deemed to have been accepted by OFCCP at the time the appropriate OFCCP area, regional or national office has accepted such program unless within 45 days thereafter the Director has disapproved such program. The intention of

41 CFR 60-1.40 and this part is that each contractor establishment will be covered by a written affirmative action program and that all the contractor's employees will be included in an affirmative action program regardless of where they work. Contractors may reach agreements with OFCCP on nationwide AAP formats or methodology.

§ 60-2.3 Submission of affirmative action programs and support data.

(a) The contractor shall submit the affirmative action program and supporting documentation within 15 days of receipt of a request from OFCCP. The terms "affirmative action program" and "supporting documentation" refer to the required contents of Affirmative Action Programs, as set forth in Subpart B of this part, and Methods of Implementing the Requirements of Subpart B, set forth in Subpart C of this part.

(b) The contractor also shall submit the affirmative action program and supporting documentation upon OFCCP's request when a complaint is being investigated or a preaward compliance review is being conducted.

(c) The contractor in accordance with 41 CFR 60-1.43, shall provide full access to and copies of all additional, relevant information and data for the on-site phase of the review.

(d) The contractor shall provide, for off-site review, all data or information determined by the compliance officer to be necessary to analyze more fully alleged deficiencies or violations before a determination of compliance is made.

(e) If a contractor fails or refuses to submit its affirmative action program and supporting documentation or other information as required by paragraphs (a), (b), (c) and (d) of this section, enforcement proceedings authorized by this chapter may be initiated against the contractor after appropriate conciliation efforts have been attempted, without issuing a show cause notice or notice of violations.

§ 60-2.4 Confidentiality and relevancy of information.

(a) *Desk audit data.* If the contractor is concerned with the confidentiality of such information as lists of employees, employee names, reasons for termination and pay data, then alphabetic or numeric coding or the use of an index of pay and pay ranges are acceptable for desk audit purposes.

(b) *Data required for off-site analysis.* The contractor must provide all data determined by the compliance officer to be necessary for off-site analysis pursuant to § 60-2.3(d) of this part. Such data may only be coded if the contractor makes the code available to the compliance officer. If the contractor believes that particular information which is to be taken off-site is not relevant to compliance with the Executive Order, the contractor may request a ruling by the OFCCP Area Director. The OFCCP Area Director shall issue a ruling promptly. The contractor may appeal that ruling to the OFCCP Assistant Regional Administrator within 10 days of receipt. The Assistant Regional Administrator shall issue a final ruling promptly. Pending a final ruling, the information in question must be made available to the compliance officer off-site, but OFCCP shall take all necessary precautions to safeguard the confidentiality of such information until a final determination is made. Such information may not be copied and access to the information shall be limited to the compliance officer and personnel involved in the determination of relevancy. Data determined to be not relevant to the investigation will be returned to the contractor immediately.

(c) *Public access to information.* Information obtained from contractors under this chapter may be subject to public inspection under the Freedom of Information Act, 5 U.S.C. 552. If a contractor believes that information should be withheld from public inspection, it shall, at the time of submission of the information to the agency, clearly mark the materials "subject to a claim of confidentiality." If the agency receives a request from the public for such materials under the Freedom of Information Act, it will notify the contractor of the request and solicit a statement of reasons why the information should be withheld. As to any claim that the information contains trade secrets, or commercial

or financial information which is privileged or confidential, the contractor shall set forth, with respect to each reasonably segregable portion of the materials, the manner in which it is claimed that release of the material would cause harm to the competitive position of the contractor. If information to which the contractor has filed an objection to disclosure is determined by OFCCP to be disclosable under 5 U.S.C. 552, the contractor shall be notified of such determination at least ten days prior to disclosure of the information.

Subpart B—Required Contents of Affirmative Action Programs

§ 60-2.10 Purpose of affirmative action program.

An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of its work force where deficiencies exist.

§ 60-2.11 Required utilization analysis.

Based upon the Government's experience with compliance reviews under the Executive Order program and the contractor reporting system, minority groups are most likely to be underutilized in departments and jobs within departments that fall within the following Employer's Information Report (EEO-1) designations: Officials and managers, professionals, technicians, sales workers, office and clerical and craftsmen (skilled). As categorized by the EEO-1 designations, women are likely to be underutilized in departments and jobs within departments as follows: Officials and managers, professionals, technicians, sales workers (except over-the-counter sales in certain retail establishments), craftsmen (skilled and semi-skilled). Therefore, the contractor shall direct special attention to such jobs in its analysis and goal setting for minorities and women. Affirmative action programs must contain the following information:

(a) Workforce analysis which is defined as a listing of each job title as it appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each department or other similar organizational unit, including departmental or unit supervision. If there are separate work units or lines of progression within a department, a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges. For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed.

(b) An analysis of all major job groups at the facility, with explanation if minorities or women are currently being underutilized in any one or more job groups ("job groups" herein meaning one or a group of jobs having similar content, wage rates and opportunities). "Underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. In making the utilization analysis, the contractor shall conduct

such analysis separately for minorities and women.

(1) In determining whether minorities are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The minority population of the labor area surrounding the facility;

(ii) The size of the minority unemployment force in the labor area surrounding the facility;

(iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;

(iv) The general availability of minorities having requisite skills in the immediate labor area;

(v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

(2) In determining whether women are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The size of the female unemployment force in the labor area surrounding the facility;

(ii) The percentage of the female workforce as compared with the total workforce in the immediate labor area;

(iii) The general availability of women having requisite skills in the immediate labor area;

(iv) The availability of women having requisite skills in an area in which the contractor can reasonably recruit;

(v) The availability of women seeking employment in the labor or recruitment area of the contractor;

(vi) The availability of promotable and transferable female employees within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to women.

§ 60-2.12 Establishment of goals and timetables.

(a) The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of its deficiencies and its entire affirmative action program. Thus, in establishing the size of its goals and the length of its timetables, the contractor should consider the results which could reasonably be expected from its putting forth every good faith effort to make its overall affirmative action program work. In determining levels of goals, the contractor should consider at least the factors listed in § 60-2.11.

(b) Involve personnel relations staff, department and division heads, and local and unit managers in the goal-setting process.

(c) Goals should be significant, measurable, and attainable.

(d) Goals should be specific for planned results, with timetables for completion.

(e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.

(f) In establishing timetables to meet goals and commitments, the contractor will consider the anticipated expansion, contraction, and turnover of and in the work force.

(g) Goals, timetables, and affirmative action commitments must be designed to correct any identifiable deficiencies.

(h) Where deficiencies exist and where numbers or percentages are relevant in developing corrective action, the contractor shall establish and set forth specific goals and timetables separately for minorities and women.

(i) Such goals and timetables, with supporting data and the analysis thereof, shall be a part of the contractor's written affirmative action program and shall be maintained at each establishment of the contractor.

(j) A contractor or subcontractor extending a publicly announced preference for Indians as authorized in 41 CFR 60-1.5(a)(6) may reflect in its goals and timetables the permissive employment preference for Indians living on or near an Indian reservation.

(k) Where the contractor has not established a goal, its written affirmative action program must specifically analyze each of the factors listed in § 60-2.11 and must detail its reason for a lack of a goal.

(l) In the event it comes to the attention of the Office of Federal Contract Compliance Programs that there is a substantial disparity in the utilization of a particular minority group or men or women of a particular minority group, OFCCP may require separate goals and timetables for such minority group and may further require, where appropriate, such goals and timetables by sex for such group for such job classifications and organizational units specified by the OFCCP.

(m) Support data for the required analysis and program shall be compiled and maintained as part of the contractor's affirmative action program. This data will include but not be limited to progression line charts, seniority rosters, applicant flow data, and applicant rejection ratios indicating minority and sex status.

(n) Copies of affirmative action programs and/or copies of support data shall be made available to the Office of Federal Contract Compliance Programs, upon request, for such purposes as may be appropriate to the fulfillment of its responsibilities under Executive Order 11246, as amended.

§ 60-2.13 Additional required ingredients of affirmative action programs.

Effective affirmative action programs shall contain, but not necessarily be limited to, the following ingredients:

(a) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions.

(b) Formal internal and external dissemination of the contractor's policy.

(c) Establishment of responsibilities for implementation of the contractor's affirmative action program.

(d) Identification of problem areas (deficiencies) by organizational units and job group.

(e) Establishment of goals and objectives by organizational units and job groups, including timetables for completion.

(f) Development and execution of action-oriented programs designed to eliminate problems and further designed to attain established goals and objectives.

(g) Design and implementation of internal audit and reporting systems to measure effectiveness of the total program.

(h) Compliance of personnel policies and practices with the Sex Discrimination Guidelines (41 CFR Part 60-20).

(i) Active support of local and national community action programs and community service programs, designed to improve the employment opportunities of minorities and women.

(j) Consideration of minorities and women not currently in the work force having requisite skills who can be recruited through affirmative action measures.

§ 60-2.14 Program summary.

The affirmative action program shall be summarized and updated annually. The program summary shall be prepared in a format which shall be prescribed by the Director and published in the FEDERAL REGISTER as a notice before becoming effective. Contractors shall submit the program summary to OFCCP each year on the anniversary date of the affirmative action program.

§ 60-2.15 Compliance status.

No contractor's compliance status shall be judged alone by whether or not it reaches its goals and meets its timetables. Rather, each contractor's compliance posture shall be reviewed and determined by reviewing the contents of its program, the extent of its adherence to this program, and its good faith efforts to make its program work toward the realization of the program's goals within the timetables

set for completion. There follows an outline of examples of procedures that contractors and OFCCP should use as a guideline for establishing, implementing, and judging an acceptable affirmative action program.

Subpart C—Methods of Implementing the Requirements of Subpart B

§ 60-2.20 Development or reaffirmation of the equal employment opportunity policy.

(a) The contractor's policy statement should indicate the chief executive officer's attitude on the subject matter, assign overall responsibility and provide for a reporting and monitoring procedure. Specific items to be mentioned should include, but not be limited to:

(1) Recruit, hire, train, and promote persons in all job titles, without regard to race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification. (The term "bona fide occupational qualification" has been construed very narrowly under the Civil Rights Act of 1964. Under Executive Order 11246, as amended, and this part, this term will be construed in the same manner.)

(2) Base decisions on employment so as to further the principle of equal employment opportunity.

(3) Ensure that promotion decisions are in accord with principles of equal employment opportunity by imposing only valid requirements for promotional opportunities.

(4) Ensure that all personnel actions such as compensation, benefits, transfers, layoffs, return from layoff, company sponsored training, education, tuition assistance, social and recreation programs, will be administered without regard to race, color, religion, sex, or national origin.

§ 60-2.21 Dissemination of the policy.

(a) The contractor should disseminate its policy internally as follows:

(1) Include it in contractor's policy manual.

(2) Publicize it in company newspaper, magazine, annual report, and other media.

(3) Conduct special meetings with executive, management, and supervisory personnel to explain intent of policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude.

(4) Schedule special meetings with all other employees to discuss policy and explain individual employee responsibilities.

(5) Discuss the policy thoroughly in both employee orientation and management training programs.

(6) Meet with union officials to inform them of policy, and request their cooperation.

(7) Include nondiscrimination clauses in all union agreements, and review all contractual provisions to insure they are nondiscriminatory.

(8) Publish articles covering EEO programs, progress reports, promotions, etc., of minority and female employees, in company publications.

(9) Post the policy on company bulletin boards.

(10) When employees are featured in product or consumer advertising, employee handbooks or similar publications both minority and nonminority, men and women should be pictured.

(11) Communicate to employees the existence of the contractor's affirmative action program and make available such elements of its program as will enable such employees to know of and avail themselves of its benefits.

(b) The contractor should disseminate its policy externally as follows:

(1) Inform all recruiting sources verbally and in writing of company policy, stipulating that these sources actively recruit and refer minorities and women for all positions listed.

(2) Incorporate the equal opportunity clause in all purchase orders, leases, contracts, etc., covered by Executive Order 11246, as amended, and its implementing regulations.

(3) Notify minority and women's organizations, community agencies, community leaders, secondary schools, and colleges, of company policy, preferably in writing.

(4) Communicate to prospective employees the existence of the contractor's affirmative action program and make available such elements of its

program as will enable such prospective employees to know of and avail themselves of its benefits.

(5) When employees are pictured in consumer or help wanted advertising, both minority and nonminority men and women should be shown.

(6) Send written notification of company policy to all subcontractors, vendors, and suppliers requesting appropriate action on their part.

§ 60-2.22 Responsibility for implementation.

(a) An executive of the contractor should be appointed as director or manager of company equal opportunity programs. Depending upon the size and geographical alignment of the company, this may be his or her sole responsibility. He or she should be given the necessary top management support and staffing to execute the assignment. His or her identity should appear on all internal and external communications on the company's equal opportunity programs. His or her responsibilities should include, but not necessarily be limited to:

(1) Developing policy statements, affirmative action programs, internal and external communication techniques.

(2) Assisting in the identification of problem areas.

(3) Assisting line management in arriving at solutions to problems.

(4) Designing and implementing audit and reporting systems that will:

(i) Measure effectiveness of the contractor's programs.

(ii) Indicate need for remedial action.

(iii) Determine the degree to which the contractor's goals and objectives have been attained.

(5) Serve as liaison between the contractor and enforcement agencies.

(6) Serve as liaison between the contractor and minority organizations, women's organizations and community action groups concerned with employment opportunities of minorities and women.

(7) Keep management informed of latest developments in the entire equal opportunity area.

(b) Line responsibilities should include, but not be limited to the following:

(1) Assistance in the identification of problem areas and establishment of local and unit goals and objectives.

(2) Active involvement with local minority organizations, women's organizations, community action groups and community service programs.

(3) Periodic audit of training programs, hiring and promotion patterns to remove impediments to the attainment of goals and objectives.

(4) Regular discussions with local managers, supervisors, and employees to be certain the contractor's policies are being followed.

(5) Review of the qualifications of all employees to insure that minorities and women are given full opportunities for transfers and promotions.

(6) Career counseling for all employees.

(7) Periodic audit to insure that each location is in compliance in areas such as:

(i) Posters are properly displayed.

(ii) All facilities, including company housing, which the contractor maintains for the use and benefit of its employees, are in fact desegregated, both in policy and use. If the contractor provides facilities such as dormitories, locker rooms and rest rooms, they must be comparable for both sexes.

(iii) Minority and female employees are afforded a full opportunity and are encouraged to participate in all company sponsored educational, training, recreational, and social activities.

(8) Supervisors should be made to understand that their work performance is being evaluated on the basis of their equal employment opportunity efforts and results, as well as other criteria.

(9) It shall be a responsibility of supervisors to take actions to prevent harassment of employees placed through affirmative action efforts.

§ 60-2.23 Identification of problem areas by organizational units and job groups.

(a) An in-depth analysis of the following should be made, paying particular attention to trainees and those categories listed in § 60-2.11(b).

(1) Composition of the work force by minority group status and sex.

(2) Composition of applicant flow by minority group status and sex.

(3) The total selection process including position descriptions, position titles, worker specifications, application forms, interview procedures, test administration, test validity, referral procedures, final selection process, and similar factors.

(4) Transfer and promotion practices.

(5) Facilities, company sponsored recreation and social events, and special programs such as educational assistance.

(6) Seniority practices and seniority provisions of union contracts.

(7) Apprenticeship programs.

(8) All company training programs, formal and informal.

(9) Work force attitude.

(10) Technical phases of compliance, such as poster and notification to labor unions, retention of applications, notification to subcontractors, etc.

(b) If any of the following items are found in the analysis, special corrective action should be appropriate.

(1) An "underutilization" of minorities or women in specific job groups.

(2) Lateral and/or vertical movement of minority or female employees occurring at a lesser rate (compared to work force mix) than that of nonminority or male employees.

(3) The selection process eliminates a significantly higher percentage of minorities or women than nonminorities or men.

(4) Application and related preemployment forms not in compliance with Federal legislation.

(5) Position descriptions inaccurate in relation to actual functions and duties.

(6) Formal or scored selection procedures not validated as required by the OFCCP Uniform Guidelines on Employee Selection Procedures (see 41 CFR Part 60-3).

(7) Test forms not validated by location, work performance and inclusion of minorities and women in sample.

(8) Referral ratio of minorities or women to the hiring supervisor or manager indicates a significantly higher percentage are being rejected as compared to nonminority and male applicants.

(9) Minorities or women are excluded from or are not participating in company sponsored activities or programs.

(10) De facto segregation still exists at some facilities.

(11) Seniority provisions contribute to overt or inadvertent discrimination, i.e., a disparity by minority group status or sex exists between length of service and types of job held.

(12) Nonsupport of company policy by managers, supervisors or employees.

(13) Minorities or women underutilized or significantly underrepresented in training or career improvement programs.

(14) No formal techniques established for evaluating effectiveness of EEO programs.

(15) Lack of access to suitable housing inhibits recruitment efforts and employment of qualified minorities.

(16) Lack of suitable transportation (public or private) to the work place inhibits minority employment.

(17) Labor unions and subcontractors not notified of their responsibilities.

(18) Purchase orders do not contain EEO clause.

(19) Posters not on display.

§ 60-2.24 Development and execution of programs.

(a) The contractor should conduct detailed analyses of position descriptions to insure that they accurately reflect position functions, and are consistent for the same position from one location to another.

(b) The contractor should validate worker specifications by division, department location or other organizational unit and by job title using job performance criteria. Special attention should be given to academic, experience and skill requirements to insure that the requirements in themselves do not constitute inadvertent discrimination. Specifications should be consistent for the same job title in all locations and should be free from bias as regards to race, color, religion, sex (except where sex is a bona fide occu-

pational qualification) or national origin. Where requirements screen out a disproportionate number of minorities or women, such requirements should be professionally validated to job performance.

(c) Approved position descriptions and worker specifications, when used by the contractor, should be made available to all members of management involved in the recruiting, screening, selection, and promotion process. Copies should also be distributed to all recruiting sources.

(d) The contractor should evaluate the total selection process to insure freedom from bias and, thus, aid the attainment of goals and objectives.

(1) All personnel involved in the recruiting, screening, selection, promotion, disciplinary, and related processes should be carefully selected and trained to insure elimination of bias in all personnel actions.

(2) The contractor shall observe the requirements of the OFCCP Uniform Guidelines on Employee Selection Procedures.

(3) Selection techniques other than tests may also be improperly used so as to have the effect of discriminating against minority groups and women. Such techniques include but are not restricted to, unscored interviews, unscored or casual application forms, arrest records, credit checks, considerations of marital status or dependency or minor children. Where there exist data suggesting that such unfair discrimination or exclusion of minorities or women exists, the contractor should analyze its unscored procedures and eliminate them if they are not objectively valid.

(e) Suggested techniques to improve recruitment and increase the flow of minority or female applicants follow:

(1) Certain organizations such as the Urban League, Job Corps, Equal Opportunity Programs, Inc., Concentrated Employment programs, Neighborhood Youth Corps, Secondary Schools, Colleges, and City Colleges with high minority enrollment, the State Employment Service, specialized employment agencies, Aspira, LULAC, SER, the G.I. Forum, the Commonwealth of Puerto Rico are normally prepared to refer minority applicants. Organizations prepared to refer women with specific skills are: National Organization for Women, Welfare Rights organizations, Women's Equity Action League, Talent Bank from Business and Professional Women (including 26 women's organizations), Professional Women's Caucus, Intercollegiate Association of University Women, Negro Women's sororities and service groups such as Delta Sigma Theta, Alpha Kappa Alpha, and Zera Phi Beta; National Council of Negro Women, American Association of University Women, YWCA, and sectarian groups such as Jewish Women's Groups, Catholic Women's Groups and Protestant Women's Groups, and women's colleges. In addition, community leaders as individuals shall be added to recruiting sources.

(2) Formal briefing sessions should be held, preferably on company premises, with representatives from these recruiting sources. Plant tours, presentations by minority and female employees, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefings. Formal arrangements should be made for referral of applicants, followup with sources, and feedback on disposition of applicants.

(3) Minority and female employees, using procedures similar to paragraph (e)(2) of this section, should be actively encouraged to refer applicants.

(4) A special effort should be made to include minorities and women on the Personnel Relations staff.

(5) Minority and female employees should be made available for participation in Career Days, Youth Motivation Programs, and related activities in their communities.

(6) Active participation in "Job Fairs" is desirable. Company representatives so participating should be given authority to make on-the-spot commitments.

(7) Active recruiting programs should be carried out at secondary schools, junior colleges, and colleges with predominant minority or female enrollments.

(8) Recruiting efforts at all schools should incorporate special efforts to reach minorities and women.

(9) Special employment programs should be undertaken whenever possible. Some possible programs are:

(i) Technical and nontechnical co-op programs with predominately Negro and women's colleges.

(ii) "After school" and/or work-study jobs for minority youths, male and female.

(iii) Summer jobs for underprivileged youth, male and female.

(iv) Summer work-study programs for male and female faculty members of the predominantly minority schools and colleges.

(v) Motivation, training and employment programs for the hardcore unemployed, male and female.

(10) When recruiting brochures pictorially present work situations, the minority and female members of the work force should be included, especially when such brochures are used in school and career programs.

(11) Help wanted advertising should be expanded to include the minority news media and women's interest media on a regular basis.

(f) The contractor should insure that minority and female employees are given equal opportunity for promotion. Suggestions for achieving this result include:

(1) Post or otherwise announce promotional opportunities.

(2) Make an inventory of current minority and female employees to determine academic, skill and experience level of individual employees.

(3) Initiate necessary remedial, job training and workstudy programs.

(4) Develop and implement formal employee evaluation programs.

(5) Make certain "worker specifications" have been validated on job performance related criteria. (Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent.)

(6) When apparently qualified minority or female employees are passed over for upgrading, require supervisory personnel to submit written justification.

(7) Establish formal career counseling programs to include attitude development, education aid, job rotation, buddy system and similar programs.

(8) Review seniority practices and seniority clauses in union contracts to ensure that such practices or clauses are nondiscriminatory and do not have a discriminatory effect.

(g) Make certain facilities and company-sponsored social and recreation activities are desegregated. Actively encourage all employees to participate.

(h) Encourage child care, housing and tranportation programs appropriately designed to improve the employment opportunities for minorities and women.

§ 60-2.25 Internal audit and reporting systems.

(a) The contractor should monitor records of referrals, placements, transfers, promotions and terminations at all levels to ensure that nondiscriminatory policy is carried out.

(b) The contractor should require formal reports form unit managers on a scheduled basis as to the degree to which corporate or unit goals are attained and timetables met.

(c) The contractor should review report results with all levels of management.

(d) The contractor should advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

[45 FR 86239, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

§ 60-2.26 Support of action programs.

(a) The contractor should appoint key members of management to serve on merit employment councils, community relations boards and similar organizations.

(b) The contractor should encourage minority and female employees to participate actively in National Alliance of Businessmen programs for youth motivation.

(c) The contractor should support vocational guidance institutes, vestibule training programs and similar activities.

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(d) The contractor should assist secondary schools and colleges in programs designed to enable minority and female graduates of these institutions to compete in the open employment market on a more equitable basis.

(e) The contractor should publicize achievements of minority and female employees in local and minority news media.

(f) The contractor should support programs developed by such organizations as National Alliance of Businessmen, the Urban Coalition and other organizations concerned with employment opportunities for minorities or women.

Subpart D—Miscellaneous

§ 60-2.30 Use of goals.

The purpose of a contractor's establishment and use of goals is to insure that it meet its affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin.

§ 60-2.31 Preemption.

To the extent that any state or local laws, regulations or ordinances, including those which grant special benefits to persons on account of sex, are in conflict with Executive Order 11246, as amended, or with the requirements of this part, OFCCP will regard them as preempted under the Executive order.

§ 60-2.32 Supersedure.

All orders, instructions, regulations, and memorandums of the Secretary of Labor, other officials of the Department of Labor and contracting agencies are hereby superseded to the extent that they are inconsistent herewith, including a previous "Order No. 4" from this office dated January 30, 1970. Nothing in this part is intended to amend 41 CFR Part 60-3 or 41 CFR Part 60-20.

PART 60-4—CONSTRUCTION CONTRACTORS—AFFIRMATIVE ACTION REQUIREMENTS

Sec.

60-4.1 Scope and application.
60-4.2 Solicitations.
60-4.3 Equal opportunity clauses.
60-4.4 Affirmative action requirements.
60-4.5 Hometown plans.
60-4.6 Goals and timetables.
60-4.7 Effect on other regulations.
60-4.8 Show cause notice.
60-4.9 Incorporation by operation of the Order.

AUTHORITY: Secs. 201, 202, 205, 211, 301, 302, and 303 of E.O. 11246, as amended, 30 FR 12319; 32 FR 14303, as amended by E.O. 12086.

SOURCE: 45 FR 86245, Dec. 30, 1980, unless otherwise noted.

§ 60-4.1 Scope and application.

This part applies to all contractors and subcontractors which hold any Federal or federally assisted construction contract in excess of $10,000. The regulations in this part are applicable to all of a construction contractor's or subcontractor's construction employees who are engaged in on site construction including those construction employees who work on a non-Federal or nonfederally assisted construction site. This part also establishes procedures which all Federal contracting officers and all applicants, as applicable, shall follow in soliciting for and awarding Federal or federally assisted construction contracts. Procedures also are established which administering agencies shall follow in making any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of Executive Order 11246, as amended.

In addition, this part applies to construction work performed by construction contractors and subcontractors for Federal nonconstruction contractors and subcontractors if the construction work is necessary in whole or in part to the performance of a nonconstruction contract or subcontract.

§ 60-4.2 Solicitations.

(a) All Federal contracting officers and all applicants shall include the

notice set forth in paragraph (d) of this section and the Standard Federal Equal Employment Opportunity Construction Contract Specifications set forth in § 60-4.3 of this part in all solicitations for offers and bids on all Federal and federally assisted construction contracts or subcontracts to be performed in geographical areas designated by the Director pursuant to § 60-4.6 of this part. Administering agencies shall require the inclusion of the notice set forth in paragraph (d) of this section and the specifications set forth in § 60-4.3 of this part as a condition of any grant, contract, subcontract, loan, insurance or guarantee involving federally assisted construction covered by this Part 60-4.

(b) All nonconstruction contractors covered by Executive Order 11246 and the implementing regulations shall include the notice in paragraph (d) of this section in all construction agreements which are necessary in whole or in part to the performance of the covered nonconstruction contract.

(c) Contracting officers, applicants and nonconstruction contractors shall give written notice to the Director within 10 working days of award of a contract subject to these provisions. The notification shall include the name, address and telephone number of the contractor; employer identification number; dollar amount of the contract, estimated starting and completion dates of the contract; the contract number; and geographical area in which the contract is to be performed.

(d) The following notice shall be included in, and shall be a part of, all solicitations for offers and bids on all Federal and federally assisted construction contracts or subcontracts in excess of $10,000 to be performed in geographical areas designed by the Director pursuant to § 60-4.6 of this part (see 41 CFR 60-4.2(a)):

NOTICE OF REQUIREMENT FOR AFFIRMATIVE ACTION TO ENSURE EQUAL EMPLOYMENT OPPORTUNITY (EXECUTIVE ORDER 11246)

1. The Offeror's or Bidder's attention is called to the "Equal Opportunity Clause" and the "Standard Federal Equal Employment Opportunity Construction Contract Specifications" set forth herein.

2. The goals and timetables for minority and female participation, expressed in percentage terms for the Contractor's aggregate workforce in each trade on all construction work in the covered area, are as follows:

Timetables	Goals for minority participation for each trade	Goals for female participation in each trade
.....	Insert goals for each year.	Insert goals for each year.

These goals are applicable to all the Contractor's construction work (whether or not it is Federal or federally assisted) performed in the covered area. If the contractor performs construction work in a geographical area located outside of the covered area, it shall apply the goals established for such geographical area where the work is actually performed. With regard to this second area, the contractor also is subject to the goals for both its federally involved and nonfederally involved construction.

The Contractor's compliance with the Executive Order and the regulations in 41 CFR Part 60-4 shall be based on its implementation of the Equal Opportunity Clause, specific affirmative action obligations required by the specifications set forth in 41 CFR 60-4.3(a), and its efforts to meet the goals. The hours of minority and female employment and training must be substantially uniform throughout the length of the contract, and in each trade, and the contractor shall make a good faith effort to employ minorities and women evenly on each of its projects. The transfer of minority or female employees or trainees from Contractor to Contractor or from project to project for the sole purpose of meeting the Contractor's goals shall be a violation of the contract, the Executive Order and the regulations in 41 CFR Part 60-4. Compliance with the goals will be measured against the total work hours performed.

3. The Contractor shall provide written notification to the Director of the Office of Federal Contract Compliance Programs within 10 working days of award of any construction subcontract in excess of $10,000 at any tier for construction work under the contract resulting from this solicitation. The notification shall list the name, address and telephone number of the subcontractor, employer identification number of the subcontractor; estimated dollar amount of the subcontract; estimated starting and completion dates of the subcontract; and the geographical area in which the subcontract is to be performed.

4. As used in this Notice, and in the contract resulting from this solicitation, the

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"covered area" is (insert description of the geographical areas where the contract is to be performed giving the state, county and city, if any).

[45 FR 86245, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

§ 60-4.3 Equal opportunity clauses.

(a) The equal opportunity clause published at 41 CFR 60-1.4(a) of this chapter is required to be included in and is part of, all nonexempt Federal contracts and subcontracts, including construction contracts and subcontracts. The equal opportunity clause published at 41 CFR 60-1.4(b) is required to be included in, and is a part of, all nonexempt federally assisted construction contracts and subcontracts. In addition to the clauses described above, all Federal contracting officers, all applicants and all nonconstruction contractors, as applicable, shall include the specifications set forth in this section in all Federal and federally assisted construction contracts in excess of $10,000 to be performed in geographical areas designated by the Director pursuant to § 60-4.6 of this part and in construction subcontracts in excess of $10,000 necessary in whole or in part to the performance of nonconstruction Federal contracts and subcontracts covered under the Executive Order.

STANDARD FEDERAL EQUAL EMPLOYMENT OPPORTUNITY CONSTRUCTION CONTRACT SPECIFICATIONS (EXECUTIVE ORDER 11246)

1. As used in these specifications:

a. "Covered area" means the geographical area described in the solicitation from which this contract resulted;

b. "Director" means Director, Office of Federal Contract Compliance Programs, United States Department of Labor, or any person to whom the Director delegates authority;

c. "Employer identification number" means the Federal Social Security number used on the Employer's Quarterly Federal Tax Return, U.S. Treasury Department Form 941.

d. "Minority" includes:

(i) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);

(ii) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);

(iii) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and

(iv) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

2. Whenever the Contractor, or any Subcontractor at any tier, subcontracts a portion of the work involving any construction trade, it shall physically include in each subcontract in excess of $10,000 the provisions of these specifications and the Notice which contains the applicable goals for minority and female participation and which is set forth in the solicitations from which this contract resulted.

3. If the Contractor is participating (pursuant to 41 CFR 60-4.5) in a Hometown Plan approved by the U.S. Department of Labor in the covered area either individually or through an association, its affirmative action obligations on all work in the Plan area (including goals and timetables) shall be in accordance with that Plan for those trades which have unions participating in the Plan. Contractors must be able to demonstrate their participation in and compliance with the provisions of any such Hometown Plan. Each Contractor or Subcontractor participating in an approved Plan is individually required to comply with its obligations under the EEO clause, and to make a good faith effort to achieve each goal under the Plan in each trade in which it has employees. The overall good faith performance by other Contractors or subcontractors toward a goal in an approved Plan does not excuse any covered Contractor's or Subcontractor's failure to take good faith efforts to achieve the Plan goals and timetables.

4. The Contractor shall implement the specific affirmative action standards provided in paragraphs 7 a through p of these specifications. The goals set forth in the solicitation from which this contract resulted are expressed as percentages of the total hours of employment and training of minority and female utilization the Contractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. Covered construction contractors performing construction work in geographical areas where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the work is being performed. Goals are published periodically in the FEDERAL REGISTER in notice form, and such notices may be obtained from any Office of Federal Contract Compliance Programs office or from Federal procurement

contracting officers. The Contractor is expected to make substantially uniform progress in meeting its goals in each craft during the period specified.

5. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the Contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the Contractor's obligations under these specifications, Executive Order 11246, or the regulations promulgated pursuant thereto.

6. In order for the nonworking training hours of apprentices and trainees to be counted in meeting the goals, such apprentices and trainees must be employed by the Contractor during the training period, and the Contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U.S. Department of Labor.

7. The Contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:

a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor's employees are assigned to work. The Contractor, where possible, will assign two or more women to each construction project. The Contractor shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.

b. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.

c. Maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the Contractor, this shall be documented in the file with the reason therefor, along with whatever additional actions the Contractor may have taken.

d. Provide immediate written notification to the Director when the union or unions with which the Contractor has a collective bargaining agreement has not referred to the Contractor a minority person or woman sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.

e. Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under 7b above.

f. Disseminate the Contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.

g. Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions including specific review of these items with onsite supervisory personnel such as Superintendents, General Foremen, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.

h. Disseminate the Contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the Contractor's EEO policy with other Contractors and Subcontractors with whom the Contractor does or anticipates doing business.

i. Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority

and female recruitment and training organizations serving the Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.

j. Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of a Contractor's work force.

k. Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR Part 60–3.

l. Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.

m. Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Contractor's obligations under these specifications are being carried out.

n. Ensure that all facilities and company activities are nonsegregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.

o. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

p. Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations.

8. Contractors are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations (7a through p). The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under 7a through p of these Specifications provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the Contractor's minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's and failure of such a group to fulfill an obligation shall not be a defense for the Contractor's noncompliance.

9. A single goal for minorities and a separate single goal for women have been established. The Contractor, however, is required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and non-minority. Consequently, the Contractor may be in violation of the Executive Order if a particular group is employed in a substantially disparate manner (for example, even though the Contractor has achieved its goals for women generally, the Contractor may be in violation of the Executive Order if a specific minority group of women is underutilized).

10. The Contractor shall not use the goals and timetables or affirmative action standards to discriminate against any person because of race, color, religion, sex, or national origin.

11. The Contractor shall not enter into any Subcontract with any person or firm debarred from Government contracts pursuant to Executive Order 11246.

12. The Contractor shall carry out such sanctions and penalties for violation of these specifications and of the Equal Opportunity Clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementing regulations, by the Office of Federal Contract Compliance Programs. Any Contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Executive Order 11246, as amended.

13. The Contractor, in fulfilling its obligations under these specifications, shall implement specific affirmative action steps, at least as extensive as those standards prescribed in paragraph 7 of these specifications, so as to achieve maximum results from its efforts to ensure equal employment opportunity. If the Contractor fails to comply with the requirements of the Executive Order, the implementing regulations, or these specifications, the Director shall proceed in accordance with 41 CFR 60–4.8.

14. The Contractor shall designate a responsible official to monitor all employment related activity to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the Government and to keep records. Records shall at least include for each employee the name, address, tele-

phone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in any easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors shall not be required to maintain separate records.

15. Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

(b) The notice set forth in 41 CFR 60-4.2 and the specifications set forth in 41 CFR 60-4.3 replace the New Form for Federal Equal Employment Opportunity Bid Conditions for Federal and Federally Assisted Construction published at 41 FR 32482 and commonly known as the Model Federal EEO Bid Conditions, and the New Form shall not be used after the regulations in 41 CFR Part 60-4 become effective.

[45 FR 86245, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

§ 60-4.4 Affirmative action requirements.

(a) To implement the affirmative action requirements of Executive Order 11246 in the construction industry, the Office of Federal Contract Compliance Programs previously has approved affirmative action programs commonly referred to as "Hometown Plans," has promulgated affirmative action plans referred to as "Imposed Plans" and has approved "Special Bid Conditions" for high impact projects constructed in areas not covered by a Hometown or an Imposed Plan. All solicitations for construction contracts made after the effective date of the regulations in this part shall include the notice specified in § 60-4.2 of this part and the specifications in § 60-4.3 of this part in lieu of the Hometown and Imposed Plans including the Philadelphia Plan and the Special Bid Conditions. Until the Director has issued an order pursuant to § 60-4.6 of this part establishing goals and timetables for minorities in the appropriate geographical areas or for a project covered by Special Bid Conditions, the goals and timetables for minorities to be inserted in the Notice required by 41 CFR 60-4.2 shall be the goals and timetables contained in the Hometown Plan, Imposed Plan or Special Bid Conditions presently covering the respective geographical area or project involved.

(b) Signatories to a Hometown Plan (including heavy highway affirmative action plans) shall have 45 days from the effective day of the regulations in this part to submit under such a Plan (for the director's approval) goals and timetables for women and to include female representation on the Hometown Plan Administrative Committee. Such goals for female representation shall be at least as high as the goals established for female representation in the notice issued pursuant to 41 CFR 60-4.6. Failure of the signatories, within the 45-day period, to include female representation and to submit goals for women or a new plan, as appropriate, shall result in an automatic termination of the Office of Federal Contract Compliance program's approval of the Hometown Plan. At any time the Office of Federal Contract Compliance Programs terminates or withdraws its approval of a Hometown Plan, or when the plan expires and another plan is not approved, the contractors signatory to the plan shall be covered automatically by the specifications set forth in § 60-4.3 of this part and by the goals and timetables established for that geographical area pursuant to § 60-4.6 of this part.

§ 60-4.5 Hometown plans.

(a) A contractor participating, either individually or through an association, in an approved Hometown Plan (including heavy highway affirmative action plans) shall comply with its affirmative action obligations under Executive Order 11246 by complying with its obligations under the plan: *Provided,* That each contractor or subcontractor participating in an approved plan is individually required to comply with the equal opportunity clause set

forth in 41 CFR 60-1.4; to make a good faith effort to achieve the goals for each trade participating in the plan in which it has employees; and that the overall good performance by other contractors or subcontractors toward a goal in an approved plan does not excuse any covered contractor's or subcontractor's failure to take good faith efforts to achieve the plan's goals and timetables. If a contractor is not participating in an approved Hometown Plan it shall comply with the specifications set forth in § 60-4.3 of this part and with the goals and timetables for the appropriate area as listed in the notice required by 41 CFR 60-4.2 with regard to that trade. For the purposes of this Part 60-4, a contractor is not participating in a Hometown Plan for a particular trade if it:

(1) Ceases to be signatory to a Hometown Plan covering that trade;

(2) Is signatory to a Hometown Plan for that trade but is not party to a collective bargaining agreement for that trade;

(3) Is signatory to a Hometown Plan for that trade but is party to a collective bargaining agreement with labor organizations which are not or cease to be signatories to the same Hometown Plan for that trade;

(4) Is signatory to a Hometown Plan for that trade but is party to a collective bargaining agreement with a labor organization for that trade but the two have not jointly executed a specific commitment to minority and female goals and timetables and incorporated the commitment in the Hometown Plan for that trade;

(5) Is participating in a Hometown Plan for that trade which is no longer acceptable to the Office of Federal Contract Compliance Programs;

(6) Is signatory to a Hometown Plan for that trade but is party to a collective bargaining agreement with a labor organization for that trade and the labor organization and the contractor have failed to make a good faith effort to comply with their obligations under the Hometown Plan for that trade.

(b) Contractors participating in Hometown Plans must be able to demonstrate their participation and document their compliance with the provisions of the Hometown Plan.

[45 FR 86245, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

§ 60-4.6 Goals and timetables.

The Director, from time to time, shall issue goals and timetables for minority and female utilization which shall be based on appropriate workforce, demographic or other relevant data and which shall cover construction projects or construction contracts performed in specific geographical areas. The goals, which shall be applicable to each construction trade in a covered contractor's or subcontractor's entire workforce which is working in the area covered by the goals and timetables, shall be published as notices in the FEDERAL REGISTER, and shall be inserted by the contracting officers and applicants, as applicable, in the Notice required by 41 CFR 60-4.2. Covered construction contractors performing construction work in geographical areas where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the work is being performed.

§ 60-4.7 Effect on other regulations.

The regulations in this part are in addition to the regulations contained in this chapter which apply to construction contractors and subcontractors generally. See particularly, 41 CFR 60-1.4 (a), (b), and (c); 60-1.5; 60-1.7; 60-1.8; 60-1.28; 60-1.29; 60-1.30; 60-1.31; 60-1.32; 60-1.41; 60-1.42; 60-1.43; 60-1.46; 60-1.47; 60-1.48; and 41 CFR Part 60-3; Part 60-20; Part 60-30; Part 60-40; and Part 60-50.

§ 60-4.8 Show cause notice.

If an investigation or compliance review reveals that a construction contractor or subcontractor has violated the Executive Order, any contract clause, specifications or the regulations in this chapter and if administrative enforcement is contemplated, the Director shall issue to the contractor or subcontractor a notice to show cause which shall contain the items specified in paragraphs (i) through (iv) of 41 CFR 60-1.25(c)(1). If the contractor does not show good cause

within 30 days, or in the alternative, fails to enter an acceptable conciliation agreement which includes where appropriate, make up goals and timetables, back pay, and seniority relief for affected class members, the OFCCP shall follow the procedure in 41 CFR 60-1.29: *Provided*, That where a conciliation agreement has been violated, no show cause notice is required prior to the initiation of enforcement proceedings.

§ 60-4.9 Incorporation by operation of the order.

By operation of the Order, the equal opportunity clause contained in § 60-1.4, the Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity (Executive Order 11246) contained in § 60-4.2, and the Standard Federal Equal Employment Opportunity Construction Contract Specifications (Executive Order 11246) contained in § 60-4.3 shall be deemed to be a part of every solicitation or of every contract and subcontract, as appropriate, required by the Order and the regulations in this chapter to include such clauses whether or not they are physically incorporated in such solicitation or contract and whether or not the contract is written.

PART 60-20—SEX DISCRIMINATION GUIDELINES

Sec.

60-20.1 Title and purpose.
60-20.2 Recruitment and advertisement.
60-20.3 Job policies and practices.
60-20.4 Seniority systems.
60-20.5 Discriminatory wages and placements.
60-20.6 Affirmative action.
60-20.7 Pregnancy, childbirth and related medical conditions.
60-20.8 Sexual advances and favors.

AUTHORITY: Sec. 201, E. O. 11246, 30 FR 12319, and E. O. 11375, 32 FR 14303, as amended by E. O. 12086.

SOURCE: 45 FR 86249, Dec. 30, 1980, unless otherwise noted.

OMB CONTROL No. 1215-0072. (47 FR 14696, Apr. 6, 1982)

§ 60-20.1 Title and purpose.

The purpose of the provisions in this part is to set forth the interpretations and guidelines of the Office of Federal Contract Compliance Programs regarding the implementation of Executive Order 11246, as amended, for the promotion and ensuring of equal opportunities for all persons employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts, without regard to sex. Experience has indicated that special problems related to the implementation of the Executive Order require a definitive treatment beyond the terms of the Order itself. These interpretations are to be read in connection with existing regulations, set forth in Parts 60-1 and 60-2 of this chapter.

§ 60-20.2 Recruitment and advertisement.

(a) Contractors engaged in recruiting activity shall recruit employees of both sexes for all jobs unless sex is a bona fide occupational qualification.

(b) Advertisements in newspapers and other media for employment sponsored by or on behalf of contractors shall not depict, express a preference, or indicate that a particular sex is sought, desired or better suited for a particular job unless sex is a bona fide occupational qualification for the job. The placement of an advertisement in columns headed "Male" or "Female", or similar wording, will be considered an expression of a preference, limitation, specification, or discrimination based on sex.

§ 60-20.3 Job policies and practices.

(a) Written personnel policies relating to this subject area must expressly indicate that there shall be no discrimination against employees on account of sex. If the contractor deals with a bargaining representative for its employees and there is a written agreement on conditions of employment, such agreement shall not be inconsistent with these guidelines.

(b) Employees of both sexes shall have an equal opportunity to any available job that he or she is qualified to perform, unless sex is a bona fide occupational qualification.

NOTE: In most Government contract work there are only limited instances where valid reasons can be expected to exist which

would justify the exclusion of all men or all women from any given job.

(c)(1) The contractor must not make any distinction based upon sex in employment opportunities, wages, hours or other conditions of employment, including fringe benefits. As the Supreme Court held in *Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702 (1978), fringe benefits for similarly situated men and women must be equal, notwithstanding that the contractor's contributions for men and women are unequal.

(2) [Reserved]

(d) Any distinction between married and unmarried persons of one sex that is not made between married and unmarried persons of the opposite sex will be considered to be a distinction made on the basis of sex. Similarly, a contractor must not deny employment to women with young children unless it has the same exclusionary policies for men; or terminate an employee of one sex in a particular job classification upon reaching a certain age unless the same rule is applicable to members of the opposite sex.

(e) The contractor's policies and practices must assure appropriate physical facilities to both sexes. The contractor may not refuse to hire men or women, or deny men or women a particular job because there are no restroom or associated facilities, unless the contractor is able to show that providing the facilities would be unreasonable for such reasons as excessive expense or lack of space.

(f)(1) A contractor must not deny a female employee the right to any job that she is qualified to perform in reliance upon a state "protective" law. For example, such laws include those which prohibit women from performing in certain types of occupations (e.g., a bartender or a core-maker); from working at jobs requiring more than a certain number of hours; and from working at jobs that require lifting or carrying more than designated weights.

(2) Such legislation was intended to be beneficial, but, instead, has been found to result in restricting employment opportunities for men and/or women. Accordingly, it cannot be used as a basis for denying employment or for establishing sex as a bona fide occupational qualification for the job.

(g) The contractor must not specify any differences for male and female employees on the basis of sex in either mandatory or optional retirement age.

(h) Nothing in these guidelines shall be interpreted to mean that differences in capabilities for job assignments do not exist among individuals and that such distinctions may not be recognized by the contractor in making specific assignments. The purpose of these guidelines is to ensure that such distinctions are not based upon sex.

§ 60-20.4 Seniority systems.

When they exist, seniority lines and lists must not be based upon sex. Where such a separation has existed, the contractor must eliminate this distinction and provide appropriate relief.

§ 60-20.5 Discriminatory wages and placements.

(a) *Wages.* The contractor's wage schedules must not be related to or based on the sex of the employees.

While the more obvious cases of discrimination exist where employees of different sexes are paid different wages on jobs which require substantially equal skill, effort and responsibility and are performed under similar working conditions, compensation practices with respect to any jobs where males or females are concentrated will be scrutinized closely to assure that sex has played no role in the setting of levels of pay.

(b) *Placements.* The Contractor may not discriminatorily restrict one sex to certain jobs. In such a situation, the contractor shall provide appropriate relief and shall ensure that all jobs are made available to all qualified employees without regard to sex. (Example: An electrical manufacturing company may have a production division with three functional units: One (assembly) all female; another (wiring), all male; and a third (circuit boards), also all male. The highest wage attainable in the assembly unit is considerably less than that in the circuit board and wiring units. In such a case the con-

tractor must take steps to provide qualified female employees opportunity for placement in job openings in the other two units with red circling of wages, where appropriate, and without loss of seniority.)

§ 60-20.6 Affirmative action.

(a) Women typically have not been found in significant numbers in management. In many companies management trainee programs are one of the ladders to management positions. Traditionally, few if any, women have been admitted into these programs. An important element of affirmative action shall be a commitment to include female candidates in such programs.

(b) Distinctions based on sex may not be made in other training programs. Both sexes should have equal access to all training programs and affirmative action programs should demonstrate that such access has been provided.

(c) The contractor shall take affirmative action to recruit women for jobs in which they previously have been excluded or are underrepresented. The contractor also shall take affirmative action to encourage the participation of women in training programs for jobs in which they have been previously excluded or are underrepresented.

NOTE: This can be done by various methods. Examples include, but are not limited to (1) Including in itineraries of recruiting trips, (i) women's colleges where graduates with skills desired by the contractor can be found, and (ii) female students of coeducational institutions and (2) stating in advertisements that women will be considered equally with men for jobs.

§ 60-20.7 Pregnancy, childbirth and related medical conditions.

(a) Employees or applicants for employment shall not be denied employment because of pregnancy, childbirth or related medical conditions.

(b) Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities. Health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion, are not required to be paid by the contractor; nothing herein, however, precludes the contractor from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Order if it has a disparate impact on employees of one sex and is not justified by business necessity.

(d)(1) Any fringe benefit program, or fund, or insurance program which is in effect on October 31, 1978, which does not treat women affected by pregnancy, childbirth, or related medical conditions the same as other persons not so affected but similar in their ability or inability to work, must be in compliance with the provisions of § 60-20.7(b) by April 29, 1979. In order to come into compliance with the provisions of § 60-20.7(b) there can be no reduction of benefits or compensation which were in effect on October 31, 1978, before October 31, 1979, or the expiration of a collective bargaining agreement in effect on October 31, 1978, whichever is later.

(2) Any fringe benefit program implemented after October 31, 1978, must comply with the provisions of § 60-20.7(b) upon implementation.

§ 60-20.8 Sexual harassment and favors.

(a) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature are violations of the Order when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of "unreasonably" interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

(b) A contractor is liable under the Order for the acts of its officials, managers and supervisors when these individuals engage in the activities described in paragraph (a) of this section, regardless of whether their specific acts were authorized or forbidden by the contractor and regardless of whether the contractor knew or should have known of their occurrence.

(c) With respect to conduct between fellow employees, a contractor is responsible for acts of sexual harassment in the workplace where the contractor (or its officials, managers and supervisors) knows or should have known of the conduct and fails to take immediate and appropriate action.

(d) A contractor also may be responsible for the acts of nonemployees, with respect to sexual harassment of employees in the workplace, where the contractor (or its officials, managers and supervisors) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, OFCCP will consider the extent of the contractor's control and any other legal responsibility which the contractor may have with respect to the conduct of such nonemployees.

(e) Where employment opportunity or benefits are granted because of an individual's submission to the contractor's sexual advances or requests for sexual favors, the contractor may be held liable under the Order for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

PART 60-30—RULES OF PRACTICE FOR ADMINISTRATIVE PROCEEDINGS TO ENFORCE EQUAL OPPORTUNITY UNDER EXECUTIVE ORDER 11246, SECTION 402, AND SECTION 503

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AUTHORITY: Secs. 201, 205, 208, 209, 301, 302(b) and 303(a) of the Executive Order 11246, as amended, 30 FR 12319; 32 FR 14303; § 60-1.26 of Part 60-1 of this chapter (41 CFR Part 60-1), as amended by E.O. 12086.

SOURCE: 45 FR 86251, Dec. 30, 1980, unless otherwise noted.

GENERAL PROVISIONS

§ 60-30.1 Applicability of rules.

This part provides the rules of practice for all administrative proceedings, instituted to enforce equal employment opportunity under Executive Order 11246, section 402 of the Vietnam Era Veterans Readjustment Assistance Act and section 503 of the Rehabilitation Act. In the absence of a specific provision, procedures shall be in accordance with the Federal Rules of Civil Procedure. This part is not applicable to hearings held by the Director under §§ 60-1.9, 60-1.27, or § 60-1.48 of this chapter.

§ 60-30.2 Waiver, modification.

Upon notice to all parties, the Administrative Law Judge may, with respect to matters pending before him/her modify or waive any rule herein upon a determination that no party will be prejudiced and that the ends of justice will be served thereby.

§ 60-30.3 Computation of time.

In computing any period of time under the rules in this part or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government in which event it includes the next business day. When the period of time allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays observed by the Federal Government shall be excluded from the computation.

§ 60-30.4 Form, filing, service of pleadings and papers.

(a) *Form.* The original of all pleadings and papers in a proceeding conducted under the regulations in this part shall be filed with the Administrative Law Judge assigned to the case or with the Chief Administrative Law Judge if the case has not been assigned. Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case file number assigned by the Administrative Law Judge, and a designation of the pleading or paper (e.g., complaint, motion to dismiss, etc.). The pleading or papers shall be signed and shall contain the address and telephone number of the person representing the party or the person on whose behalf the pleading or paper was filed. Unless the Administrative Law Judge otherwise orders with respect to specific pleadings and papers in a specific case, all such papers and pleadings are public documents.

(b) *Service.* Service upon any party shall be made by the party filing the pleading or document by delivering a copy to the party or by mailing a copy to the party's last known address. When a party is represented by an attorney, service shall be made upon the attorney.

(c) *Proof of service.* A certificate of the person serving the pleading or other document by personal delivery or by mailing, setting forth the manner of service, shall be proof of service.

PREHEARING PROCEDURES

§ 60-30.5 Administrative complaint.

(a) *Filing.* The Solicitor of Labor, Associate Solicitor for Civil Rights and Regional Solicitors, upon referral from the Office of Federal Contract Compliance Programs, are authorized to institute enforcement proceedings by filing a complaint and serving the complaint upon the contractor which shall be designated as the defendant. The Department of Labor, OFCCP, shall be designated as plaintiff.

(b) *Contents.* The complaint shall contain a concise jurisdictional statement, and a clear and concise statement sufficient to put the defendant on notice of the acts or practices it is alleged to have committed in violation of the Order, or section 402 or 503. The complaint shall also contain a prayer regarding the relief being sought, a statement of whatever sanctions the Government will seek to impose and the name and address of the attorney who will represent the Government. The notice pleading contemplated by this paragraph (b) shall conform to notice pleading under the Federal Rules of Civil Procedure.

(c) *Amendment.* The complaint may be amended once as a matter of course before an answer is filed, and the defendant may amend its answer once as a matter of course not later than 10 days after the filing of the original answer. Other amendments of the complaint or of the answer to the complaint shall be made only by leave of the Administrative Law Judge or by written consent of the adverse party; and leave shall be freely given where justice so requires. An amended complaint shall be answered within 14 days of its service, or within the time for filing an answer to the original complaint, whichever period is longer. If a response is required to an amended answer, such response shall be made within 14 days of service of the amended answer.

§ 60-30.6 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint, the defendant shall file an answer; the answer shall be filed with the Chief Administrative Law Judge if the case has not been assigned to an Administrative Law Judge. The answer shall be signed by the defendant or its attorney, and served on the Government in accordance with § 60-30.4(b).

(b) *Contents; failure to file.* The answer shall (1) contain a statement of the facts which constitute the grounds of defense, and shall specifically admit, explain, or deny, each of the allegations of the complaint unless the defendant is without knowledge, in which case the answer shall so state; or (2) state that the defendant admits all the allegations of the complaint. The answer may contain a waiver of hearing; and if not, a separate paragraph in the answer shall request a hearing. The answer shall contain the name and address of the defendant, or of the attorney representing the defendant. Failure to file an answer or to plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

(c) *Procedure upon admission of facts.* The admission, in the answer or by failure to file an answer, of all the material allegations of fact contained in the complaint shall constitute a waiver of hearing. Upon such admission, the Administrative Law Judge, without further hearing, may prepare his/her decision in which he/she shall adopt as his/her proposed findings of fact the material facts alleged in the complaint. The parties shall be given an opportunity to file exceptions to the decision and to file briefs in support of the exceptions.

§ 60-30.7 Notice of prehearing conference.

Within 45 days after the answer is filed, the Administrative Law Judge shall notice the parties for a prehearing conference. The Administrative Law Judge shall conduct a final prehearing conference in accordance with § 60-30.12(c)(1) of this part.

§ 60-30.8 Motions; disposition of motions.

(a) *Motions.* Motions shall state the relief sought, the authority relied upon and the facts alleged, and shall be filed with the Administrative Law Judge. If made before or after the hearing itself, the motions shall be in writing. If made at the hearing, motions may be stated orally; but the Administrative Law Judge may require that they be reduced to writing and filed and served on all parties in the same manner as a formal motion. Unless otherwise ordered by the Administrative Law Judge, written motions shall be accompanied by a supporting memorandum. Within 10 days after a written motion is served, or such other time period as may be fixed, any party may file a response to a motion.

(b) *Disposition of motions.* The Administrative Law Judge may not grant a written motion prior to expiration of the time for filing responses thereto, except upon consent of the parties or following a hearing, but may overrule or deny such motion without awaiting response. The Administrative Law Judge shall make every reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing: *Provided,* That prehearing conferences, hearings, and decisions need not be delayed pending disposition of motions.

(c) *Motions to compel discovery.* Prior to filing a motion to compel discovery under sections 60-30.9 through 60-30.11 of this part, counsel for the moving party shall communicate with opposing counsel concerning the matter in dispute and attempt to resolve it. Counsel for the moving party shall file with the motion a certificate of compliance with this rule.

[45 FR 86251, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

§ 60-30.9 Interrogatories, and admissions as to facts and documents.

(a) *Interrogatories.* Any party may serve upon a party written interrogatories. Each interrogatory shall be answered separately and fully in writing under oath, unless objected to. Answers are to be signed by the person making them and objections are to be signed by the attorney or by whomever is representing the party. Answers and objections shall be filed and served within 25 days of service of the interrogatory. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

(b) *Admissions.* Any party may serve upon a party a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters as to which an admission is requested shall be deemed admitted, unless within 25 days after service, the party to whom the request is directed serves upon the requesting party a sworn statement either (1) denying specifically the matter as to which an admission is requested, or (2) setting forth in detail the reasons why it cannot truthfully either admit or deny such matters.

(c) *Objections or failures to respond.* The party submitting the interrogatory or request may move for an order with respect to any objection or other failure to respond.

(d) *Filing with Administrative Law Judge.* All interrogatories and requests for admissions, and all responses thereto, shall be filed with the Administrative Law Judge and shall become a part of the record of the case.

§ 60-30.10 Production of documents and things and entry upon land for inspection and other purposes.

(a) After commencement of the action, any party may serve on any other party a request to produce and/or permit the party, or someone acting on its behalf, to inspect and copy any unprivileged documents, phonorecords, and other compilations, including computer tapes and printouts, which contain or may lead to relevant information and which are in the possession, custody, or control of the party upon whom the request is served. If necessary, translation of data compilations shall be done by the party furnishing the information.

(b) After commencement of the action, any party may serve on any other party a request to permit entry upon designated property which may be relevant to the issues in the proceeding and which is in the possession or control of the party upon whom the

request is served, for the purpose of inspection, measuring, surveying or photographing, testing, or sampling the property or any designated object or area.

(c) Each request shall set forth with reasonable particularity the items to be inspected and shall specify a reasonable time and place for making the inspection and performing the related acts.

(d) The party upon whom the request is served shall respond within 25 days after the service of the request. The response shall state, with respect to each item, that inspection and related activities will be permitted as requested, unless there are objections, in which case the reasons for each objection shall be stated. The party submitting the request may move for an order with respect to any objection or other failure to respond.

§ 60-30.11 Depositions upon oral examination.

(a) *Depositions; notice of examination.* After commencement of the action, any party may take the testimony of any person, including a party, having personal or expert knowledge of the matters in issue, by deposition upon oral examination. A party desiring to take a deposition shall give reasonable notice in writing to every other party to the proceeding, and may use an administrative subpena. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice shall also set forth the categories of documents the witness is to bring to the deposition, if any. A copy of the notice shall be furnished to the person to be examined unless his/her name is unknown.

(b) *Production of witnesses; obligation of parties; objections.* It shall be the obligation of each party to produce for examination any person, along with such documents as may be requested, at the time and place, and on the date, set forth in the notice, if that party has control over such person. Each party shall be deemed to have control over its officers, agents, employees, and members. Unless the parties agree otherwise, depositions shall be held within the county in which the witness resides or works. The party or prospective witness may file with the Administrative Law Judge an objection within 5 days after notice of production of such witness is served, stating with particularity the reasons why the party cannot or ought not to produce a requested witness. The party serving the notice may move for an order with respect to such objection or failure to produce a witness. All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(c) *Before whom taken; scope of examination; failure to answer.* Depositions may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the deposition is held. At the time and place specified in the notice, each party shall be permitted to examine and cross-examine the witness under oath upon any matter which is relevant to the subject matter of the proceeding, or which is reasonably calculated to lead to the production of relevant and otherwise admissible evidence. Errors which might be cured at the taking of the deposition, including errors in the manner of taking the deposition, in the form of the questions or answers, in the oath, or in the conduct of the parties, are waived unless objection is made at the taking of the deposition. All other objections may, in the discretion of the objecting party, be raised at the taking of the deposition or reserved until the hearing. All objections made at the taking of the deposition shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. A refusal or failure on the part of any person under the control of a party to answer a question shall operate to create a presumption that the answer, if given, would be unfavorable to the controlling party, unless the question is sub-

sequently ruled improper by the Administrative Law Judge or the Administrative Law Judge rules that there was valid justification for the witness' failure or refusal to answer the question: *Provided,* That the examining party shall note on the record during the deposition the question which the deponent has failed, or refused to answer, and state his/her intention to invoke the presumption if no answer is forthcoming.

(d) *Subscription; certification; filing.* The testimony shall be reduced to typewriting, either by the officer taking the deposition or under his/her direction, and shall be submitted to the witness for examination and signing. If the deposition is not signed by the witness because he/she is ill, dead, cannot be found, or refuses to sign it, such fact shall be noted in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver the original copy of the transcript, together with his/her certificate, in person or by mail to the Administrative Law Judge. Copies of the transcript and certificate shall be furnished to all persons desiring them, upon payment of reasonable charges, unless distribution is restricted by order of the Administrative Law Judge for good cause shown.

(e) *Rulings on admissibility; use of deposition.* Subject to the provisions of this section, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying. Any part or all of a deposition, so far as admissible in the discretion of the Administrative Law Judge, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice, in accordance with the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent, or was designated to testify on behalf of a public or private corporation, partnership, association, or governmental agency which is a party may be used by the adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Administrative Law Judge finds: (i) That the witness is dead; or (ii) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (iii) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (iv) upon application and notice, that such exceptional circumstances exist as to make it desirable to allow the deposition to be used.

(4) If only part of a deposition is introduced in evidence by a party, any party may introduce any other parts by way of rebuttal and otherwise.

(f) *Stipulations.* If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

[45 FR 86251, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

§ 60-30.12 Prehearing conferences.

(a) Upon his/her own motion or a motion of a party, the Administrative Law Judge may direct the parties or their counsel to meet with him/her for a conference to consider:

(1) Simplification of the issues;

(2) Necessity or desirability of amendments to pleadings for purposes of clarification, simplification, or limitation;

(3) Stipulation, admissions of fact and contents and authenticity of documents;

(4) Limitation of the number of witnesses;

(5) Scheduling dates for the exchange of witness lists and of proposed exhibits; and

(6) Such other matters as may tend to expedite the disposition of the proceedings.

(b) The record shall show the matters disposed of by order and by agreement in such pretrial conferences. The

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subsequent course of the proceeding shall be controlled by such action.

(c)(1) A final prehearing conference shall be scheduled by the Administrative Law Judge a reasonable time in advance of the hearing to develop a prehearing order. The prehearing order shall contain any matters described in subparagraph (a) of this section agreed upon by the parties or ordered by the Administrative Law Judge. The prehearing order also shall contain the general factual and legal contentions of the parties.

(2) Witness lists and hearing exhibits shall be exchanged at least 10 days in advance of the hearing, or such other later time as is set by the Administrative Law Judge. Each party shall provide to all other parties copies of all exhibits that it then plans to use at the hearing.

(3) All discovery should be concluded at least 30 days prior to the hearing or by such other later time as ordered by the Administrative Law Judge for good cause shown. Administrative Law Judges, however, shall allow adequate time for discovery.

§ 60-30.13 Consent findings and order.

(a) *General.* At any time after the issuance of a complaint and prior to or during the reception of evidence in any proceeding, the parties may jointly move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be in the discretion of the Administrative Law Judge after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the complaint and the agreement;

(3) That any further procedural steps are waived; and

(4) That any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement is waived.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their counsel may:

(1) Submit the proposed agreement to the Administrative Law Judge for his/her consideration; or

(2) Inform the Administrative Law Judge that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed, the Administrative Law Judge, within 30 days, shall accept such agreement by issuing his/her decision based upon the agreed findings, and the decision shall constitute the final Administrative Order.

[45 FR 86251, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

Hearings and Related Matters

§ 60-30.14 Designation of Administrative Law Judges.

Hearings shall be held before an Administrative Law Judge of the Department of Labor who shall be designated by the Chief Administrative Law Judge of the Department of Labor. After commencement of the proceeding but prior to the designation of an Administrative Law Judge, pleadings and papers shall be filed with the Chief Administrative Law Judge.

§ 60-30.15 Authority and responsibilities of Administrative Law Judges.

The Administrative Law Judge shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. He/she shall have all powers necessary to those ends, including but not limited to, the power to:

(a) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of

the proceeding by consent of the parties or upon his/her own motion;

(b) Require parties to state their position with respect to the various issues in the proceedings;

(c) Require parties to produce for examination those relevant witnesses and documents under their control; and require parties to answer interrogatories, and requests for admission, in full and produce documents for examination and copying;

(d) Administer oaths;

(e) Rule on motions and other procedural items or matters pending before him/her;

(f) Regulate the course of the hearing and conduct of participants therein;

(g) Examine and cross-examine witnesses and introduce into the record documentary or other evidence;

(h) Receive, rule on, exclude, or limit evidence and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;

(i) Fix time limits for submission of written documents in matters before him/her and extend any time limits established by this part upon a determination that no party will be prejudiced and that the ends of justice will be served thereby;

(j) Impose appropriate sanctions against any party or person failing to obey an order under these rules which may include:

(1) Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting it from introducing designated matters into evidence;

(2) Excluding all testimony of an unresponsive or evasive witness, or determining that the answer of such witness, if given, would be unfavorable to the party having control over him/her;

(3) Expelling any party or person from further participation in the hearing; and

(4) Invoking a presumption that the answers or actions ordered if made, would be unfavorable or adverse to the party ordered to answer or act.

(k) Take official notice of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice;

(l) Recommend whether the defendant violated the Order, section 402 or section 503, as well as the nature of the relief necessary to ensure the full enjoyment of the rights secured by the Order, section 402 or section 503;

(m) Issue subpenas;

(n) Render interlocutory decisions for the Department of Labor in preliminary enforcement proceedings under § 60-30.38; and

(o) Take any action authorized by these rules.

[45 FR 86251, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

§ 60-30.16 Appearances.

(a) *Representation.* The parties or other persons or organizations participating pursuant to this part 60-30 have the right to be represented by counsel.

(b) *Failure to appear.* In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present shall have an election to present its evidence in whole or such portion thereof sufficient to make a prima facie case before the Administrative Law Judge. Failure to appear at the hearing shall not be deemed to be a waiver of the right to be served with a copy of the Administrative Law Judge's recommended decision and to file exceptions to it.

§ 60-30.17 Appearance of witnesses.

(a) A party wishing to procure the appearance at the hearing of any person having personal or expert knowledge of the matters in issue shall serve on the prospective witness a notice, which may be accomplished by an administrative subpena, setting forth the time, date, and place at which he/she is to appear for the purpose of giving testimony. The notice shall also set forth the categories of documents the witness is to bring with him/her to the hearing, if any. A copy of the notice shall be filed with the Administrative Law Judge and additional copies shall be served upon the parties.

(b) It shall be the obligation of each party to produce for examination any person, along with such documents as

may be requested, at the time and place, and on the date, set forth in the notice, if that party has control over such person. Each party shall be deemed to have control over its officers, agents, employees, and members. Due regard shall be given to the convenience of witnesses in scheduling their testimony so that they will be detained no longer than reasonably necessary.

(c) The party or prospective witness may file an objection within 5 days after notice of production of such witness is served stating with particularity the reasons why the party cannot produce a requested witness. The party serving the notice may move for an order with respect to such objection or failure to produce a witness.

§ 60-30.18 Evidence; testimony.

Formal rules of evidence shall not apply, but rules or principles, including the Federal Rules of Evidence, designed to assure production of the most probative evidence available shall be applied. Testimony shall be given orally by witnesses at the hearing. Except as set forth in § 60-30.11(e), depositions may not be introduced into evidence in lieu of testimony given at the hearing. A witness shall be available for cross-examination, and, at the discretion of the Administrative Law Judge, may be cross-examined without regard to the scope of direct examination as to any matter which is relevant and material to the proceeding. The Administrative Law Judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious.

§ 60-30.19 Objections; exceptions; offer of proof.

(a) *Objections.* If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination or the failure to limit such scope, it shall state briefly the grounds for such objection. Rulings on all objections shall appear in the record. Only objections made on the record may be relied upon subsequently in the proceedings.

(b) *Exceptions.* Formal exception to an adverse ruling is not required. Rulings by the Administrative Law Judge shall not be appealed prior to the transfer of the case to the Secretary. Exceptions to such rulings shall be filed in accordance with 41 CFR 60-30.28.

(c) *Offer of proof.* An offer of proof made in conection with an objection taken to any ruling excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in written form or consists of references to documents, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof. The offer of proof should clearly and specifically indicate the significance of the excluded evidence, unless the substance is apparent from the context. Allowance of an offer of proof is within the discretion of the Administrative Law Judge.

§ 60-30.20 Ex parte communications.

The Administrative Law Judge shall not consult any person, or party, on any fact in issue unless upon notice and opportunity for all parties to participate. No employee or agent of the Federal Government engaged in the investigation and prosecution of this case shall participate or advise in the rendering of the recommended or final decision in the case, except as witness or counsel in the proceeding.

§ 60-30.21 Oral argument.

Any party shall be entitled upon request to a reasonable period between the close of evidence and termination of the hearing for oral argument. Oral arguments shall be included in the official transcript of the hearing.

§ 60-30.22 Official transcript.

The official transcripts of testimony taken, together with any exhibits, briefs, or memorandums of law, shall be filed with the Administrative Law Judge. Transcripts of testimony may be obtained from the official reporter by the parties and the public as provided in section 11(a) of the Federal Advisory Committee Act (86 Stat. 770).

Upon notice to all parties, the Administrative Law Judge may authorize such corrections to the transcript as are necessary to reflect accurately the testimony.

§ 60-30.23 Summary judgment.

(a) *For the Government.* At any time after the expiration of 20 days from the commencement of the action, or after service of a motion for summary judgment by the defendant, the Government may move with or without supporting affidavits for a summary judgment upon all claims or any part.

(b) *For defendant.* The defendant may, at any time after commencement of the action, move with or without supporting affidavits for summary judgment in its favor as to all claims or any part.

(c) *Other parties.* Any other party to a formal proceeding under this part may support or oppose motions for summary judgment made by the Government or defendant, in accordance with this section, but may not move for summary judgment in its own behalf.

(d) *Statement of uncontested facts.* All motions for summary judgment shall be accompanied by a "Statement of Uncontested Facts" in which the moving party sets forth all alleged uncontested material facts which shall provide the basis for its motion. At least 5 days prior to the time fixed for hearing on the motion, any party contending that any material fact regarding the matter covered by the motion is in dispute, shall file a "Statement of Disputed Facts." Failure to file a "Statement of Disputed Facts" shall be deemed as an admission to the "Statement of Uncontested Facts."

(e) *Motion and proceedings.* The motion shall be served upon all parties at least 15 days before the time fixed for the hearing on the motion. The adverse party or parties may serve opposing affidavits prior to the day of hearing. The judgment sought shall be rendered forthwith if the complaint and answer, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Summary judgment rendered for or against the Government or the defendant shall constitute the findings and recommendations on the issues involved. Hearings on motions made under this section shall be scheduled by the Administrative Law Judge.

(f) *Case not fully adjudicated on motion.* If on motion under this section judgment is not rendered upon the whole case or for all the relief asked and a final hearing is necessary, the Administrative Law Judge at the hearing of the motion, by examining the notice and answer and the evidence before him/her and by interrogating counsel, shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. He/she shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which relief is not in controversy, and directing such further proceedings as are just. At the hearing on the merits, the facts so specified shall be deemed established, and the final hearing shall be conducted accordingly.

[45 FR 86251, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

§ 60-30.24 Participation by interested persons.

(a)(1) To the extent that proceedings hereunder involve employment of persons covered by a collective bargaining agreement, and compliance may necessitate a revision of such agreement, any labor organization which is a signatory to the agreement shall have the right to participate as a party.

(2) Other persons or organizations shall have the right to participate as parties if the final Administrative Order could adversely affect them or the class they represent, and such participation may contribute materially to the proper disposition of the proceedings.

(3) Any person or organization wishing to participate as a party under this section shall file with the Administrative Law Judge and serve on all parties a petition within 25 days after the commencement of the action or at

such other time as ordered by the Administrative Law Judge, so long as it does not disrupt the proceeding. Such petition shall concisely state: (i) Petitioner's interest in the proceedings; (ii) who will appear for petitioner; (iii) the issues on which petitioner wishes to participate; and (iv) whether petitioner intends to present witnesses.

(4) The Administrative Law Judge shall determine whether each petitioner has the requisite interest in the proceedings and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interest, the Administrative Law Judge may request all such petitioners to designate a single representative to represent all such petitioners: *Provided,* That the representative of a labor organization qualifying to participate under paragraph (a)(1) of the section must be permitted to participate in the proceedings. The Administrative Law Judge shall give each petitioner written notice of the decision on its petition; and if the petition is denied, he/she shall briefly state the grounds for denial and shall then treat the petition as a request for participation as amicus curiae. The Administrative Law Judge shall give written notice to each party of each petition granted.

(b)(1) Any other interested person or organization wishing to participate as amicus curiae shall file a petition before the commencement of the final hearing with the Administrative Law Judge. Such petition shall concisely state: (i) The petitioner's interest in the hearing; (ii) who will represent the petitioner; and (iii) the issues on which petitioner intends to present argument. The Administrative Law Judge may grant the petition if he/she finds that the petitioner has a legitimate interest in the proceedings, and that such participation may contribute materially to the proper disposition of the issues. An amicus curiae is not a party but may participate as provided in this section.

(2) An amicus curiae may present a brief oral statement at the hearing at the point in the proceeding specified by the Administrative Law Judge. He/she may submit a written statement of position to the Administrative Law Judge prior to the beginning of a hearing and shall serve a copy on each party. He/she may also submit a brief or written statement at such time as the parties submit briefs and exceptions, and he/she shall serve a copy on each party.

Post-Hearing Procedures

§ 60-30.25 Posthearing briefs.

Each party and amicus may file a brief. The time for filing briefs shall be established by the Administrative Law Judge. Such briefs shall be served simultaneously on all parties and amici, and a certificate of service shall be furnished to the Administrative Law Judge. Requests for additional time in which to file a brief shall be made in writing, and copies shall be served simultaneously on the other parties. Requests for extensions shall be received not later than 3 days before the date such briefs are due. No reply brief may be filed except by special permission of the Administrative Law Judge.

§ 60-30.26 Record for recommended decision.

The transcript of testimony, exhibits, and all papers, documents, and requests filed in the proceedings, including briefs, but excepting the correspondence section of the docket, shall constitute the record for decision.

§ 60-30.27 Recommended decision.

Within a reasonable time after the filing of briefs, the Administrative Law Judge shall recommend findings, conclusions, and a decision. These recommendations shall be certified, together with the record to the Secretary of Labor for a final Administrative Order. The recommended findings, conclusions, and decision shall be served on all parties and amici to the proceeding.

§ 60-30.28 Exceptions to recommended decisions.

Within 30 days after receipt of the recommended findings, conclusions, and decision, any party may submit exceptions to said recommendation.

These exceptions may be responded to by other parties within 14 days of their receipt by said parties. All exceptions and responses shall be filed with the Secretary. Service of exceptions and responses shall be made simultaneously on all parties to the proceeding. Requests to the Secretary for additional time in which to file exceptions and responses shall be in writing and copies shall be served simultaneously on other parties. Requests for extensions must be received no later than 3 days before the exceptions are due.

§ 60-30.29 Record.

After expiration of the time for filing exceptions and responses, the Secretary shall make a final decision, which shall be the final Administrative Order, on the basis of the record. The record shall consist of the record for recommended decision, the rulings and recommended decision of the Administrative Law Judge and the exceptions and responses filed subsequent to the Administrative Law Judge's decision.

§ 60-30.30 Final Administrative Order.

After expiration of the time for filing exceptions, and responses thereto, the Secretary or the Under Secretary, in the absence of the Secretary or if the Secretary disqualifies himself or herself for any reason, shall make a final Administrative Order which shall be served on all parties. If the Secretary concludes that the defendant has violated the Order, section 402 or section 503, an Administrative Order shall be issued which shall enjoin the violations, and require the contractor to provide whatever remedies are appropriate, and which shall impose whatever sanctions are appropriate, or any of the above. In any event, failure to comply with the Administrative Order shall result in the immediate termination and suspension of the defendant's contracts and/or debarment of the defendant from further contracts: *Provided*, That the portion of any order under Executive Order 11246 terminating, cancelling, or suspending contracts shall not become effective until the consultation requirements of section 209(a)(5) of the Order, as amended by Executive Order 12086, have been satisfied.

Expedited Hearing Procedures

§ 60-30.31 Expedited hearings—when appropriate.

Expedited Hearings may be used, *inter alia*, when a contractor or subcontractor has violated a conciliation agreement; has not adopted and implemented an acceptable affirmative action program; has refused to give access to or to supply records or other information as required by the equal opportunity clause; or has refused to allow an on-site compliance review to be conducted.

§ 60-30.32 Administrative complaint and answer.

(a) Expedited hearings shall be commenced by filing an administrative complaint in accordance with 41 CFR 60-30.5. The complaint shall state that the hearing is subject to these expedited hearing procedures.

(b) The answer shall be filed in accordance with 41 CFR 60-30.6 (a) and (b).

(c) Failure to request a hearing within the 20 days provided by 41 CFR 60-30.6(c) shall constitute a waiver of hearing, and all the material allegations of fact contained in the complaint shall be deemed to be admitted. If a hearing is not requested or is waived, within 25 days of the complaint's filing, the Administrative Law Judge shall adopt as findings of fact the material facts alleged in the complaint, and shall order the appropriate sanctions and/or penalties sought in the complaint. The Administrative Law Judge's findings and order shall constitute a final Administrative Order, unless the Office of the Solicitor, U.S. Department of Labor, files exceptions to the findings and order within 10 days of receipt thereof. If the Office of the Solicitor, U.S. Department of Labor, files exceptions, the matter shall proceed in accordance with § 60-30.36 of this part.

(d) If a request for a hearing is received within 20 days as provided by 41 CFR 60-30.6(a), the hearing shall be convened within 45 days of receipt of the request and shall be completed

within 15 days thereafter, unless more hearing time is required.

§ 60-30.33 Discovery.

(a) Any party may serve requests for admissions in accordance with § 60-30.9 (b) and (c).

(b) Witness lists and hearing exhibits will be exchanged at least 10 days in advance of the hearing.

(c) For good cause shown, and upon motion made in accordance with § 60-30.8, the Administrative Law Judge may allow the taking of depositions. Other discovery will not be permitted.

§ 60-30.34 Conduct of hearing.

(a) At the hearing, the Government shall be given an opportunity to demonstrate the basis for the request for sanctions and/or remedies, and the contractor shall be given an opportunity to show that the violation complained of did not occur and/or that good cause or good faith efforts excuse the alleged violations. Both parties shall be allowed to present evidence and argument and to cross-examine witnesses.

(b) The hearing shall be informal in nature, and the Administrative Law Judge shall not be bound by formal rules of evidence.

§ 60-30.35 Recommended decision after hearing.

Within 30 days after the hearing is concluded, the Administrative Law Judge shall recommend findings, conclusions, and a decision. The Administrative Law Judge may permit the parties to file written post-hearing briefs within this time period, but the Administrative Law Judge's recommendations shall not be delayed pending receipt of such briefs. These recommendations shall be certified, together with the record, to the Secretary for a final Administrative Order. The recommended decision shall be served on all parties and amici to the proceeding.

§ 60-30.36 Exceptions to recommendations.

The provisions of 41 CFR 60-30.28 shall be applicable to exceptions to the Administrative Law Judge's recommendations.

§ 60-30.37 Final Administrative Order.

(a) After expiration of the time for filing exceptions, and responses thereto, the Secretary shall issue a final Administrative Order which shall be served on all parties. Unless the Secretary issues a final Administrative Order within 45 days after the expiration of the time for filing exceptions, and responses thereto, the Administrative Law Judge's recommended decision shall become a final Administrative Order which shall become effective on the 46th day after expiration of the time for filing exceptions and responses thereto. Except as to specific time periods required in this subsection, 41 CFR 60-30.30 shall be applicable to this subsection.

§ 60-30.38 Preliminary administrative enforcement proceedings.

(a) A preliminary enforcement proceeding is commenced by filing an administrative complaint. (See 41 CFR 60-1.29(e).) An administrative complaint may combine general allegations and prayers for relief and sanctions with a prayer for preliminary relief and sanctions or it may be limited to preliminary relief and sanctions. In the event an administrative complaint seeks preliminary and general enforcement, the allegations relating to preliminary enforcement shall be so designated and stated separately in the complaint.

An administrative complaint which is limited to preliminary relief and sanctions may be amended in accordance with 41 CFR 60-30.5(c) to make general allegations of violations and to request general relief and sanctions.

(b) The administrative complaint, as it relates to preliminary enforcement proceeding issues, shall contain a clear and concise factual statement sufficient to inform the defendant with reasonable definiteness of the acts and practices it is alleged to have committed which constitute a violation. That is, fact pleading in lieu of notice pleading which applies under § 60-30.5 of this part, shall apply to preliminary enforcement proceeding issues. The complaint also shall contain a statement of any relief being sought and/

or any sanctions which are sought to be imposed.

(c) No answer, as required by 41 CFR 60-30.6 of this part, shall be required with respect to the issues in the complaint which seek preliminary enforcement proceedings. However, the Administrative Law Judge shall notify the parties of the time and place of the hearing within 10 days after the complaint is filed.

(d) The plaintiff shall submit with the administrative complaint any affidavits and other documentation and a supporting memorandum. The defendant shall have 15 days after service of the complaint to submit any affidavits and other documentation and supporting memorandum.

(e) The Administrative Law Judge is authorized to conduct any prehearing conferences or procedures to expedite the hearing process.

(f) Discovery with regard to preliminary enforcement issues shall be granted only upon leave of the Administrative Law Judge for compelling reasons.

(g) The preliminary administrative enforcement proceeding is intended to provide a speedy hearing and decision on limited issues, and the Administrative Law Judge shall take all measures consistent with these rules and procedural fairness to achieve this end. The hearing shall commence within 20 days of the date of the notice of hearing specified in 41 CFR 60-30.38(c).

(h) If an administrative complaint is limited to preliminary relief and/or sanctions, the Administrative Law Judge shall follow the procedures in this § 60-30.38. If the Administrative complaint combines general allegations and prayers for relief with a prayer for preliminary relief and sanctions, the Administrative Law Judge shall bifurcate the proceeding. The hearing regarding the preliminary enforcement issues shall proceed in accordance with the procedures in this § 60-30.38. The issues involving the general allegations shall proceed in accordance with the regulations in this part but shall be stayed by the Administrative Law Judge pending his/her resolution of the preliminary enforcement proceeding.

(i) The decision of the Administrative Law Judge regarding the preliminary enforcement hearing issues shall be issued within 10 working days after the conclusion of the hearing. The decision shall not be delayed to await the preparation or a transcript of posthearing submissions by the parties. The decision shall set forth findings of fact and conclusions of law, including the imposition of sanctions and/or relief, where appropriate, against the contractor.

(j) If the contractor's eligibility as a Government contractor or subcontractor is an issue in the preliminary enforcement proceeding and if, at the conclusion of such proceeding, the Administrative Law Judge determines that the contractor's practices violate the Order or section 402 or 503, the decision and order shall state whether the contractor is eligible or ineligible for the award of Government contracts or subcontracts or under what circumstances the contractor will be eligible for such contracts or subcontracts during the pendency of the proceeding involving the general allegations of the administrative complaint if any were alleged in addition to the preliminary enforcement issues. In addition, it shall state whether existing contracts and subcontracts, if any, are to be cancelled, terminated, or suspended, and if so, under what conditions. *Provided*, however, that such cancellation, termination or suspension is subject to the contracting agency consultation required by Section 209(a)(5) of the Order. Such decision and order, for purposes of judicial review, shall constitute the final administrative decision of the Department of Labor on the preliminary enforcement issues. The decision and order entered at the conclusion of the preliminary enforcement stage of a bifurcated proceeding shall not prejudice either party with regard to the appropriateness of relief and sanctions which may be obtained against the contractor at the conclusion of the hearing on the general allegations in the administrative complaint.

[45 FR 86251, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

PART 60–50—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION OR NATIONAL ORIGIN

Sec.

60-50.1 Purpose and scope.
60-50.2 Equal employment policy.
60-50.3 Accommodations to religious observance and practice.
60-50.4 Enforcement.
60-50.5 Nondiscrimination.

AUTHORITY: Sec. 201, E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303, as amended by E.O. 12086.

SOURCE: 45 FR 86258, Dec. 30, 1980, unless otherwise noted.

§ 60–50.1 Purpose and scope.

(a) The purpose of the provisions in this part is to set forth the interpretations and guidelines of the Office of Federal Contract Compliance Programs regarding the implementation of Executive Order 11246, as amended, for promoting and ensuring equal employment opportunities for all persons employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts, without regard to religious or national origin.

(b) Members of various religious and ethnic groups continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin. These guidelines are intended to remedy such unfair treatment.

(c) These guidelines also are intended to clarify the obligations of contractors with respect to accommodating to the religious observances and practices of employees and prospective employees.

(d) The employment problems of blacks, Hispanics, Asians or Pacific Islanders, American Indians or Alaskan natives are treated under Part 60-2 of this chapter and under other regulations and procedures implementing the requirements of Executive Order 11246, as amended. Accordingly, the remedial provisions of § 60-50.2(b) shall not be applicable to the employment problems of these groups.

(e) Nothing contained in this Part 60-50 is intended to supersede or otherwise limit the exemption set forth in § 60-1.5(a)(5) of this chapter for contractors with certain educational institutions.

§ 60–50.2 Equal employment policy.

(a) *General requirements.* Under the equal opportunity clause contained in section 202 of Executive Order 11246, as amended, contractors are prohibited from discriminating against employees or applicants for employment because of religion or national origin, and must take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their religion or national origin. Such action includes, but is not limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

(b) *Outreach and positive recruitment.* Contractors shall review their employment practices to determine whether members of the various religious and/or ethnic groups are receiving fair consideration for job opportunities. Special attention shall be directed toward executive and middle-management levels, where employment problems relating to religion and national origin are most likely to occur. Based upon the findings of such reviews, contractors shall undertake appropriate outreach and positive recruitment activities, such as those listed below, in order to remedy existing deficiencies. It is not contemplated that contractors necessarily will undertake all the listed activities. The scope of the contractor's efforts shall depend upon all the circumstances, including the nature and extent of the contractor's deficiences and the contractor's size and resources.

(1) Internal communication of the contractor's obligation to provide equal employment opportunity without regard to religion or national origin in such a manner as to foster understanding, acceptance, and support among the contractor's executive, management, supervisory, and all other employees and to encourage

such persons to take the necessary action to aid the contractor in meeting this obligation.

(2) Development of reasonable internal procedures to ensure that the contractor's obligation to provide equal employment opportunity without regard to religion or national origin is being fully implemented.

(3) Periodically informing all employees of the contractor's commitment to equal employment opportunity for all persons, without regard to religion or national origin.

(4) Enlisting the assistance and support of all recruitment sources (including employment agencies, college placement directors, and business associates) for the contractor's commitment to provide equal employment opportunity without regard to religion or national origin.

(5) Reviewing employment records to determine the availability of promotable and transferable members of various religious and ethnic groups.

(6) Establishment of meaningful contacts with religious and ethnic organizations and leaders for such purposes as advice, education, technical assistance, and referral of potential employees.

(7) Engaging in significant recruitment activities at educational institutions with substantial enrollents of students from various religious and ethnic groups.

(8) Use of religious and ethnic media for institutional and employment advertising.

§ 60-50.3 Accommodations to religious observance and practice.

A contractor must accommodate to the religious observances and practices of an employee or prospective employee unless the contractor demonstrates that it is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the contractor's business. As part of this obligation, a contractor must make reasonable accommodations to the religious observances and practices of an employee or prospective employee who regularly observes Friday evening and Saturday, or some other day of the week, as the Sabbath and/or who observes certain religious holidays during the year and who is conscientiously opposed to performing work or engaging in similar activity on such days, when such accommodations can be made without undue hardship on the conduct of the contractor's business. In determing the extent of the contractor's obligations under this section, at least the following factors shall be considered; (a) Business necessity, (b) financial costs ar d expenses, and (c) resulting personnel problems.

60-50.4 Enforcement.

The provisions of this part are subject to the general enforcement, compliance review, and complaint procedures set forth in Part 60-1 of this chapter.

§ 60-50.5 Nondiscrimination.

The provisions of this part are not intended and shall not be used to discriminate against any qualified employee or applicant for employment because of race, color, religion, sex, or national origin.

PART 60-60—CONTRACTOR EVALUATION PROCEDURES FOR CONTRACTORS FOR SUPPLIES AND SERVICES [REMOVED]

PART 60-250—AFFIRMATIVE ACTION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS FOR DISABLED VETERANS AND VETERANS OF THE VIETNAM ERA

Subpart A—Preliminary Matters, Affirmative Action Clause, Compliance

Sec.

60-250.1 Purpose and application.
60-250.2 Coverage and waivers.
60-250.3 Affirmative action clause.
60-250.4 Applicability of the affirmative action program requirement.
60-250.5 Affirmative action policy, practices and procedures.
60-250.6 Determination of disability.

Subpart B—General Enforcement and Complaint Procedures

60-250.20 Subcontracts.
60-250.21 Duties of agencies.

Sec.

60-250.22 Evaluations by the OFCCP Assistant Regional Administrators.
60-250.23 Complaint procedures.

Subpart C—Ancillary Matters

60-250.30 Responsibilities of the Deputy Assistant Secretary for Veterans' Employment
60-250.31 Recordkeeping.

APPENDIX A
APPENDIX B

AUTHORITY: Sec. 503(a), Pub. L. 92-540, 86 Stat. 1097 (38 U.S.C. 2012), as amended by Sec. 402, Pub. L. 93-508, 88 Stat. 1593 (38 U.S.C. 2012).

SOURCE: 45 FR 86259, Dec. 30, 1980, unless otherwise noted.

Subpart A—Preliminary Matters, Affirmative Action Clause, Compliance

§ 60-250.1 Purpose and application.

The purpose of the regulations in this part is to assure compliance with section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974, which requires Government contractors to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era. The regulations in this part apply to all Government contracts, including Federal deposit or share insurance, for the furnishing of supplies or services or for the use of personal property (including construction) for $10,000 or more.

§ 60-250.2 Coverage and waivers.

(a) *General.* (1) *Transactions for less than $10,000.* Contracts and subcontracts for less than $10,000 are not covered by the Act. No agency or contractor shall procure supplies or services in less than usual quantities to avoid the applicability of the affirmative action clause.

(2) *Contracts for indefinite quantities.* With respect to indefinite delivery-type contracts (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, "call-type" contracts, and purchase notice agreements), the affirmative action clause shall be included unless the contracting agency has reason to believe that the amount to be ordered in any year under such contract will be less than $10,000. The applicability of the affirmative action clause shall be determined at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the affirmative action clause shall be applied to such contract whenever the amount of a single order is $10,000 or more. Once the affirmative action clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) *Work outside of the United States.* The requirements of the affirmative action clause are waived with respect to contracts with regard to work performed outside of the United States by employees who were not recruited within the United States.

(4) *Contracts with State or local governments.* The requirements of the affirmative action clause in any contract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

(5) *Facilities not connected with contracts.* The Director may waive the requirements of the affirmative action clause with respect to any of a contractor's facilities which he or she finds to be in all respects separate and distinct from activities of the contractor related to the performance of the contract, provided that he or she also finds that such a waiver will not interfere with or impede the effectuation of the Act. Such waivers shall be considered only upon the request of the contractor.

(b) *Waivers*—(1) *Specific contracts and classes of contracts.* The head of an agency, with the concurrence of the Director, may waive the application to any contract of any part of or all the affirmative action clause when he or she deems that special circumstances in the national interest so require. The agency head, with the concurrence of the Director, may also grant such waivers to groups or cate-

gories of contracts of the same type where it is (i) in the national interest, (ii) found impracticable to act upon each request individually, and (iii) where such waiver will substantially contribute to convenience in administration of the Act.

(2) *National security.* Any requirement set forth in the regulations in this Part 60-250 shall not apply to any contract whenever the head of the contracting agency determines that such contract is essential to the national security and that its award without complying with such requirements is necessary to the national security. Upon making such a determination, the head of the agency will notify the Director in writing within 30 days.

(c) *Withdrawal of waiver.* When a waiver has been granted for any class of contracts under this section other than contracts granted waivers under paragraph (b)(2) of this section, the Director may withdraw the waiver for a specific contract or group of contracts to be awarded, when in his or her judgment such action is necessary or appropriate to achieve the purposes of the Act. The withdrawal shall not apply to contracts awarded prior to the withdrawal, except that in procurement entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

§ 60-250.3 Affirmative action clause.

Each agency and each contractor shall include the following affirmative action clause in each of its covered Government contracts (and modifications, renewals, or extensions thereof if not included in the original contract):

AFFIRMATIVE ACTION FOR DISABLED VETERANS AND VETERANS OF THE VIETNAM ERA

(a) The contractor will not discriminate against any employee or applicant for employment because he or she is a disabled veteran or veteran of the Vietnam era in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified disabled veterans and veterans of the Vietnam era without discrimination based upon their disability or veterans status in all employment practices such as the following: Employment upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(b) The contractor agrees that all suitable employment openings of the contractor which exist at the time of the execution of this contract and those which occur during the performance of this contract, including those not generated by this contract and including those occurring at an establishment of the contractor other than the one wherein the contract is being performed but excluding those of independently operated corporate affiliates, shall be listed at an appropriate local office of the State employment service system wherein the opening occurs. The contractor further agrees to provide such reports to such local office regarding employment openings and hires as may be required.

State and local government agencies holding Federal contracts of $10,000 or more shall also list all the suitable openings with the appropriate office of the State employment service, but are not required to provide those reports set forth in paragraphs (d) and (e).

(c) Listing of employment openings with the employment service system pursuant to this clause shall be made at least concurrently with the use of any other recruitment source or effort and shall involve the normal obligations which attach to the placing of a bona fide job order, including the acceptance of referrals of veterans and nonveterans. This listing of employment openings does not require the hiring of any particular job applicant or from any particular group of job applicants, and nothing herein is intended to relieve the contractor from any requirements in Executive Orders or regulations regarding nondiscrimination in employment.

(d) The reports required by paragraph (b) of this clause shall include, but not be limited to, periodic reports which shall be filed at least quarterly with the appropriate local office or, where the contractor has more than one hiring location in a State, with the central office of that State, employment service. Such reports shall indicate for each hiring location (1) the number of individuals hired during the reporting period, (2) the number of nondisabled veterans of the Vietnam era hired, (3) the number of disabled veterans of the Vietnam era hired, and (4) the total number of disabled veterans hired. The reports should include covered veterans hired for on-the-job training

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under 38 U.S.C. 1787. The contractor shall submit a report within 30 days after the end of each reporting period wherein any performance is made on this contract identifying data for each hiring location. The contractor shall maintain at each hiring location copies of the reports submitted until the expiration of one year after final payment under the contract, during which time these reports and related documentation shall be made available, upon request, for examination by any authorized representatives of the contracting officer or of the Secretary of Labor. Documentation would include personnel records respecting job openings, recruitment and placement.

(e) Whenever the contractor becomes contractually bound to the listing provisions of this clause, it shall advise the employment service system in each State where it has establishments of the name and location of each hiring location in the State. As long as the contractor is contractually bound to these provisions and has so advised the State system, there is no need to advise the State system of subsequent contracts. The contractor may advise the State system when it is no longer bound by this contract clause.

(f) This clause does not apply to the listing of employment openings which occur and are filled outside of the 50 States, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

(g) The provisions of paragraphs (b), (c), (d), and (e) of this clause do not apply to openings which the contractor proposes to fill from within its own organization or to fill pursuant to a customary and traditional employer-union hiring arrangement. This exclusion does not apply to a particular opening once the contractor decides to consider applicants outside of its own organization or employer-union arrangement for that opening.

(h) As used in this clause: (1) "All suitable employment openings" includes, but is not limited to, openings which occur in the following job categories: Production and nonproduction; plant and office; laborers and mechanics; supervisory and nonsupervisory; technical; and executive, administrative, and professional openings as are compensated on a salary basis of less than $25,000 per year. This term includes full-time employment, temporary employment of more than 3 days' duration, and part-time employment. It does not include openings which the contractor proposes to fill from within its own organization or to fill pursuant to a customary and traditional employer-union hiring arrangement nor openings in an educational institution which are restricted to students of that institution. Under the most compelling circumstances an employment opening may not be suitable for listing, including such situations where the needs of the Government cannot reasonably be otherwise supplied, where listing would be contrary to national security, or where the requirement of listing would otherwise not be for the best interest of the Government.

(2) "Appropriate office of the State employment service system" means the local office of the Federal-State national system of public employment offices with assigned responsibility for serving the area where the employment opening is to be filled, including the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

(3) "Openings which the contractor proposes to fill from within its own organization" means employment openings for which no consideration will be given to persons outside of the contractor's organization (including any affiliates, subsidiaries, and the parent companies) and includes any openings which the contractor proposes to fill from regularly established "recall" lists.

(4) "Openings which the contractor proposes to fill pursuant to a customary and traditional employer-union hiring arrangement" means employment openings which the contractor proposes to fill from union halls, which is part of the customary and tradional hiring relationship which exists between the contractor and representatives of its employees.

(i) The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(j) In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(k) The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, provided by or through the contracting officer. Such notice shall state the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era for employment, and the rights of applicants and employees.

(l) The contractor will notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of the Vietnam Era Veterans Readjustment Assistance Act, and is committed to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era.

(m) The contractor will include the provisions of this clause in every subcontract or purchase order of $10,000 or more unless exempted by rules, regulations, or orders of

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the Secretary issued pursuant to the Act, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director of the Office of Federal Contract Compliance Programs may direct to enforce such provisions including action for noncompliance.

§ 60-250.4 Applicability of the affirmative action program requirement.

(a) Within 120 days of the commencement of a contract, every Government contractor which has 50 or more employees and (1) has a contract of $50,000 or more or (2) has contracts (at least one of which is at least $10,000) which total $50,000 or more in any 12-month period shall prepare and maintain an affirmative action program at each establishment which shall set forth the contractor's policies, practices and procedures in accordance with § 60-250.5 of this part. This program may be integrated into or kept separate from other affirmative action programs of the contractor which OFCCP requires it to maintain pursuant to this chapter.

(b) The affirmative action program shall be reviewed and updated annually. If there are any significant changes in procedures, rights or benefits as a result of the annual updating, those changes shall be communicated to employees and applicants for employment.

(c) The contractor shall submit the affirmative action program within 15 days of receipt of a request from OFCCP. The contractor shall also submit the affirmative action program upon OFCCP's request when a complaint is being investigated or a preaward compliance review is being conducted.

(d) The full affirmative action program shall be available to any employee or applicant for employment for inspection upon request. The location and hours during which the program may be obtained shall be posted at each establishment.

(e) The contractor shall invite all disabled veterans and veterans of the Vietnam era who wish to benefit under the affirmative action program to identify themselves to the contractor. The invitation shall state that the information is voluntarily provided, that it will be kept confidential, that refusal to provide it will not subject the applicant or employee to any adverse treatment and that it will be used only in accordance with the Act, and regulations in this part. If an applicant or employee so identifies himself or herself, the contractor should also seek the advice of the applicant or employee regarding proper placement and appropriate accommodation (an acceptable form for such an invitation is set forth in Appendix A of this part). Nothing in this section shall preclude an employee from informing a contractor at a future time of his or her desire to benefit from this program. Nothing in this section shall relieve a contractor from liability for discrimination under the Act.

§ 60-250.5 Affirmative action policy, practices and procedures.

(a) *General requirements.* Under the affirmative action obligation imposed by the Vietnam Era Veterans Readjustment Assistance Act of 1974, contractors are required to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era at all levels of employment, including the executive level. Such action shall apply to all employment practices, including, but not limited to, the following: hiring, upgrading, demotion or transfer, recruitment, or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship and on-the-job training programs under 38 U.S.C. 1787.

(b) *Proper consideration of qualifications.* Contractors shall review their personnel processes to determine whether their present procedures assure careful, thorough and systematic consideration of the job qualifications of known disabled veteran applicants and Vietnam era veteran applicants for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. In determining the qualifications of a covered veteran, the contractor shall consider only that portion of the mili-

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tary record, including discharge papers, relevant to the specific job qualifications for which the veteran is being considered. To the extent that it is necessary to modify their personnel procedures, contractors shall include the development of new procedures for this purpose in their affirmative action program required under this part. These procedures must be designed so as to facilitate a review of the implementation of this requirement by the contractor or the Government. (Appendix B of this part is an example of an appropriate set of procedures. The procedures in Appendix B are not required and contractors may develop other procedures which are appropriate to their circumstances.)

(c) *Physical and mental qualifications.* (1) The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the review of all physical or mental job qualification requirements to ensure that, to the extent qualification requirements tend to screen out qualified disabled veterans, they are job related and are consistent with business necessity and the safe performance of the job.

(2) Whenever a contractor applies physical or mental job qualification requirements in the selection of applicants or employees for employment or other change in employment status such as promotion, demotion, or training, to the extent that qualification requirements tend to screen out qualified disabled veterans, the requirements shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and the safe performance of the job. The contractor shall have the burden to demonstrate that it has complied with the requirements of this paragraph.

(3) Nothing is this section shall prohibit a contractor from conducting a comprehensive medical examination prior to employment provided that the results of such an examination shall be used only in accordance with the requirements of this section. Whenever a contractor inquires into an applicant's or employee's physical or mental condition or conducts a medical examination prior to employment or change in employment status information obtained in response to such inquiries or examination shall be kept confidential except that:

(i) Supervisors and managers may be informed regarding restrictions on the work or duties of disabled veterans and regarding accommodations; and

(ii) first aid and safety personnel may be informed, where and to the extent appropriate, if the condition might require emergency treatment; and

(iii) Government officials investigating compliance with the Act shall be informed.

(d) *Accommodation to physical and mental limitations of employees.* A contractor must make a reasonable accommodation to the physical and mental limitations of a disabled veteran unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business. In determining the extent of a contractor's accommodation obligations, the following factors among others may be considered: (1) Business necessity and (2) financial costs and expenses.

(e) *Compensation.* In offering employment or promotions to disabled veterans, and veterans of the Vietnam era, the contractor may not reduce the amount of compensation offered because of any disability income, pension or other benefit the applicant or employee receives from another source.

(f) *Outreach, positive recruitment, and external dissemination of policy.* Contractors shall review their employment practices to determine whether their personnel programs provide the required affirmative action for employment and advancement of qualified disabled veterans and veterans of the Vietnam era. Based upon the findings of such reviews, contractors shall undertake appropriate outreach and positive recruitment activities, such as those listed below. It is not contemplated that contractors will necessarily undertake all the listed activities or that their activities will be limited to those listed. The scope of a contractor's efforts shall depend upon all the circumstances, including the contrac-

tor's size and resources and the extent to which existing employment practices are adequate.

(1) The contractor should develop internal communication of its obligation to engage in affirmative action efforts to employ qualified disabled veterans and veterans of the Vietnam era in such a manner as to foster understanding, acceptance and support among the contractor's executive, managment, supervisory and all other employees and to encourage such persons to take the necessary action to aid the contractor in meeting this obligation.

(2) The contractor should develop reasonable internal procedures to ensure that its obligation to engage in affirmative action to employ and promote qualified disabled veterans and veterans of the Vietnam era is being fully implemented.

(3) The contractor should periodically inform all employees and prospective employees of its commitment to engage in affirmative action to increase employment opportunities for qualified disabled veterans and veterans of the Vietnam era.

(4) The contractor should enlist the assistance and support of all recruiting sources including as follows:

(i) The local Veterans Employment Representative or his or her designee in the State Employment Service Office nearest each establishment where hiring takes place to recruit job ready veterans and to develop on-the-job training opportunities for covered veterans wherever feasible;

(ii) The Veterans Administration Regional Office nearest each establishment to develop on-the-job training opportunities for covered veterans, and to recruit job ready veterans;

(iii) The office of the National Alliance of Businessmen nearest each establishment where hiring takes place in order to cooperate in the Jobs for Veterans' Program;

(iv) The veterans' counselors and coordinators ("Vet-Reps" and "VCIPS") on college campuses for the recruitment of covered veterans;

(v) The service officers of the national veterans groups active in the area of each establishment where hiring takes place for the recruitment of covered veterans; and

(vi) Local veterans' groups and veterans' service centers in the area of each establishment where employment services are performed near major cities, for the recruitment of covered veterans.

(5) The contractor should establish meaningful contacts with appropriate veterans' service organizations which service disabled veterans or veterans of the Vietnam era, for such purposes as advice, technical assistance and referral of potential employees. Technical assistance from the resources listed in this paragraph may consist of advice on proper placement, recruitment, training and accommodations contractors may undertake, but no such resource providing technical assistance shall have the authority to approve or disapprove the acceptability of affirmative action programs.

(6) The contractor should review employment records to determine the availability of promotable and transferrable qualified known disabled veterans and veterans of the Vietnam era presently employed, and to determine whether their present and potential skills are being fully utilized or developed.

(7) The contractor should send written notification of company policy to all subcontractors, vendors and suppliers, requesting appropriate action on their part.

(8) The contractor should consider all qualified disabled veterans and veterans of the Vietnam era not currently in the workforce having requisite skills who can be recruited through affirmative action measures.

(g) *Internal dissemination of policy.* A strong outreach program will be ineffective without adequate internal support from supervisory and management personnel and other employees. In order to assure greater employee cooperation and participation in the contractor's efforts, the contractor should adopt, implement and disseminate this policy internally as follows:

(1) Include it in the contractor's policy manual.

(2) Publicize it in the company newspaper, magazine, annual report and other media.

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(3) Conduct special meetings with executive, management, and supervisory personnel to explain the intent of the policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude.

(4) Schedule special meetings with all employees to discuss policy and explain individual employee responsibilities.

(5) Discuss the policy thoroughly in both employee orientation and management training programs.

(6) Meet with union officials to inform them of the contractor's policy, and request their cooperation.

(7) Include nondiscrimination clauses in all union agreements, and review all contractual provisions to ensure they are nondiscriminatory.

(8) Include articles on accomplishments of disabled veterans and veterans of the the Vietnam era in company publications.

(9) Post the policy on company bulletin boards, including a statement that employees and applicants are protected from coercion, intimidation, interference or discrimination for filing a complaint or assisting in an investigation under the Act.

(h) *Responsibility for implementation.* An executive of the contractor should be designated as director or manager of company affirmative action activities under these regulations. His or her identity should appear on all internal and external communications regarding the company's affirmative action programs. This executive should be given necessary top management support and staff to manage the implementation of this program, including the following activities:

(1) Develop policy statements, affirmative action programs, and internal and external communication techniques. The latter techniques should include regular discussions with local managers, supervisors and employees to be certain the contractor's policies are being followed. In addition, supervisors should be advised that:

(i) Their work performance is being evaluated on the basis of their affirmative action efforts and results, as well as other criteria.

(ii) The contractor is obligated to prevent harassment of employees placed through affirmative action efforts, as set forth in 41 CFR 60-1.28.

(2) Identify problem areas in conjunction with line management and known disabled veterans, in the implementation of the affirmative action programs, and develop solutions. This is particularly important for the accommodations requirements.

(3) Design and implement audit and reporting systems that will:

(i) Measure effectiveness of the contractor's programs.

(ii) Indicate need for remedial action.

(iii) Determine the degree to which the contractor's objectives have been attained.

(iv) Determine whether known disabled veterans and veterans of the Vietnam era have had the opportunity to participate in all company sponsored educational, training, recreational and social activities.

(v) Ensure that each location is in compliance with the Act and the regulations in this Part 60-250.

(4) Serve as liaison between the contractor and enforcement agencies.

(5) Serve as liaison between the contractor and organizations of and for disabled veterans and veterans of the Vietnam era, and arrange for the active involvement by company representatives in the community service programs of local organizations of and for disabled veterans and veterans of the Vietnam era.

(6) Keep management informed of the latest developments in the entire affirmative action area.

(7) Arrange for career counseling for known disabled veterans and veterans of the Vietnam era.

(i) *Development and execution of affirmative action programs.* (1) Job qualification requirements reviewed pursuant to paragraph (c) of this section should be made available to all members of management involved in the recruitment, screening, selection, and promotion process.

(2) The contractor should evaluate the total selection process including training and promotion to ensure freedom from stereotyping disabled veterans and veterans of the Vietnam era in

a manner which limits their access to all jobs for which they are qualified.

(3) All personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes should be carefully selected and trained to ensure that the commitments in its affirmative action program are implemented.

(4) Formal briefing sessions should be held, preferably on company premises, with representatives from recruiting sources. Plant tours, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefings. Formal arrangements should be made for referral of applicants, follow up with sources, and feedback on disposition of applicants.

(5) A special effort should be made to include qualified disabled veterans or veterans of the Vietnam era on the personnel relations staff.

(6) Active participation in veterans "job fairs" is desirable.

(7) Recruiting efforts at all educational institutions should incorporate special efforts to reach disabled veterans and veterans of the Vietnam era.

(8) An effort should be made to participate in workstudy programs with Veterans' Administration rehabilitation facilities which specialize in training or educating disabled veterans.

(9) The contractor should use all available resources to continue or establish federally assisted apprenticeship and on-the-job training programs under 38 U.S.C. 1787.

[45 FR 86259, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

§ 60-250.6 Determination of disability.

Any disabled veteran filing a complaint under this part shall submit documentation from the Veterans Administration or military service from which the person was discharged or released which indicates the disability. Such documentation shall be updated within one year prior to filing the complaint if there has been a major change in the veteran's condition or if the Veterans Administration is reviewing the veteran's case.

Subpart B—General Enforcement and Complaint Procedure

§ 60-250.20 Subcontracts.

Each nonexempt contractor shall include the affirmative action clause prescribed in § 60-250.3 in each of its nonexempt subcontracts. The clause may be incorporated by reference in accordance with 41 CFR 60-1.46.

§ 60-250.21 Duties of agencies.

Each agency shall cooperate with the Director in the performance of his or her responsibilities under the Act. Such cooperation shall include the responsibility to ensure that contractors are fully cognizant of their obligations under the Act and this part, to provide the Director with any information which comes to its attention that the contractor is not in compliance with the Act or this part, and to take such actions for noncompliance as set forth in this chapter as may be ordered by the Director.

§ 60-250.22 Evaluations by the OFCCP Assistant Regional Administrators.

The Assistant Regional Administrators, OFCCP, shall be primarily responsible for undertaking compliance reviews and investigations of complaints against contractors as may be necessary to assure that the purposes of the Acts are being carried out effectively.

§ 60-250.23 Complaint procedures.

(a) *Filing complaints.* Complaints shall be filed within 180 days of the alleged violation unless the time for filing is extended for good cause shown.

(b) *Where to file.* Complaints may be filed with the OFCCP, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, or with any OFCCP regional or area office. Complaints also may be filed with the Veterans Employment Service of the Department of Labor. Complaints filed with the Veterans Employment Service shall be referred to OFCCP promptly for investigation.

(c) *Contents of complaints.* Complaints must be signed by the complainant or an authorized representa-

tive and must contain the following information. (1) name and address (including telephone number) of the complainant; (2) name and address of the contractor who committed the alleged violation; (3) a description of the act or acts considered to be a violation; (4) a statement that the alleged discriminatee is a disabled or Vietnam era veteran; and (5) any other pertinent information available which will assist in the investigation and resolution of the complaint, including the name of any known Federal agency with which the employer has contracted. Complaints alleging class-type violations which do not identify the alleged discriminatee or discriminatees will be accepted provided the other requirements of this paragraph are met. Signed third party complaints which do not identify the alleged discriminatee will be accepted, whether or not the third party signing the complaint is an authorized representative provided that the other information required by this paragraph is included.

(d) *Incomplete information.* If a complaint contains incomplete information, OFCCP shall seek the needed information from the person who filed the complaint. If the information is not furnished within 60 days of the date of the request, the case may be closed.

(e) *Investigations.* The OFCCP shall institute a prompt investigation of each complaint, and shall be responsible for developing a complete case record.

(f) *Referral to contractor.* When a complaint concerns an employee of a contractor and the contractor has an applicable internal review procedure, the complaint may be referred to the contractor for processing under that procedure if the employee gives his/her consent. The contractor shall be informed of the elements of the complaint either by being furnished a copy or a sanitized version. The complaint and all actions taken thereunder shall be kept confidential by the contractor. If the contractor is able to resolve the complaint to the satisfaction of the employee prior to the OFCCP investigation, the contractor shall notify OFCCP of the results in writing within 60 days of the referral. The case will be closed upon verification with the employee.

(g) *Resolution of matters.* (1) If the complaint investigation shows no violation of the Act or regulations, or if the matter is not recommended to the Office of the Solicitor for legal enforcement proceedings, the matter shall be closed and the complainant shall be so notified.

(2) If an investigation indicates that the contractor has not complied with the requirements of the Act, efforts shall be made to secure compliance through conciliation and persuasion within a reasonable time. Before the contractor can be found to be in compliance, it must make a specific commitment in accordance with the procedure in 41 CFR 60-1.26.

(3) If a complaint investigation or compliance review indicates a violation of the Act, and the matter has not been resolved by informal means, OFCCP may refer the matter in accordance with the procedure in 41 CFR 60-1.29(a) for consideration of any action authorized under 41 CFR 60-1.29. After a matter arising under the Act is referred to the Office of the Solicitor, the provisions of 41 CFR 60-1.29 through 60-1.31 shall be applicable to the matter in the same way those provisions apply to a matter arising under Executive Order 11246.

Subpart C—Ancillary Matters

§ 60-250.30 Responsibilities of the Deputy Assistant Secretary for Veterans' Employment.

(a) In accordance with the provisions of 38 U.S.C. 2002A, the Deputy Assistant Secretary for Veterans' Employment (DASVE) has responsibilities in all Department of Labor employment and training programs for veterans. The DASVE is responsible for assuring that the Veterans Employment Service shall monitor and evaluate adherence to the contractor job listing provisions of § 60-250.3 by state employment security agencies. Deficiencies noted by the Veterans Employment Service shall be reported through the DASVE to OFCCP. OFCCP, in coordination with the DASVE, will review contractor compliance with the man-

datory job listing requirements in the course of regularly scheduled compliance reviews.

(b) Any job openings listed pursuant to § 60-250.3, which requires contractors to list their job openings with state employment services offices, shall be utilized by state employment security agencies to refer qualified disabled veterans and veterans of the Vietnam era. (See 20 CFR 653.221(a)(7).)

(c) The local offices of the Federal-state employment service shall give priority in referral of disabled veterans and veterans of the Vietnam era to such employment openings listed by contractors pursuant to this part.

(d) The local state employment service staff shall make appropriate job development contacts with identified contractors to obtain orders for job openings. Information so obtained which is pertinent to determining compliance with the requirements to list job openings and to take affirmative action shall be made available to OFCCP.

§ 60-250.31 Recordkeeping.

(a) Each contractor shall maintain for a period not less than one year records regarding complaints and actions taken thereunder, and such employment or other records as required by the Director or by this part and shall furnish such information in the form required by the Director or as the Director deems necessary for the administration of the Act.

(b) Failure to maintain complete and accurate records as required under this section or failure to update annually the affirmative action program as required by § 60-250.4(b) constitutes noncompliance with the contractor's obligations under the Act and is a ground for the imposition of appropriate sanctions.

Appendix A

This employer is a Government contractor subject to Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974 which require Government contractors to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era. If you are a disabled veteran covered by this program and would like to be considered under the affirmative action program, please tell us. This information is voluntary and refusal to provide it will not subject you to discharge or disciplinary treatment. Information obtained concerning individuals shall be kept confidential, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of disabled veterans, and regarding necessary accommodations, and (ii) first aid personnel may be informed, when and to the extent appropriate, if the condition might require emergency treatment. In order to assure proper placement of all employees, we do request that you answer the following question: If you have a disability which might affect your performance or create a hazard to yourself or others in connection with the job for which you are applying, please state the following: (1) The skills and procedures you use or intend to use to perform the job notwithstanding the disability and (2) the accommodations we could make which would enable you to perform the job properly and safety, including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job or other accommodations.

Appendix B

The following is a set of procedures which contractors may use to meet the requirements of § 60-250.5(b).

(1) The application or personnel form of each known protected veteran should be annotated to identify each vacancy for which he or she was considered, and the form should be quickly retrievable for review by the agency, the Department of Labor and the contractor's personnel officials for use in investigations and internal compliance activities.

(2) The personnel or application records of each known protected veteran should include (i) the identification of each promotion for which he or she was considered, and (ii) the identification of each training program for which he or she was considered.

(3) In each case where a protected veteran is rejected for employment, promotion or training, a statement of the reasons should be appended to the personnel file or application form. This statement should include a comparison of the qualifications of the protected veteran and the person(s) selected, as well as a description of the accommodations considered. This statement should be available to the applicant or employee concerned upon request.

(4) Where applicants or employees are selected for hire, promotion or training and the contractor undertakes any acommodation which makes it possible for the contractor to place a protected veteran on the job, the application form or personnel record

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should contain a description of that accommodation.

PART 60-741—AFFIRMATIVE ACTION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS FOR HANDICAPPED WORKERS

Subpart A—Preliminary Matters, Affirmative Action Clause, Compliance

Sec.
60-741.1 Purpose and application.
60-741.2 Coverage and waivers.
60-741.3 Affirmative action clause.
60-741.4 Applicability of the affirmative action program requirement.
60-741.5 Affirmative action policy, practices and procedures.
60-741.6 Determination of handicap.
60-741.7 Listing of employment openings.

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60-741.20 Subcontracts.
60-741.21 Duties of agencies.
60-741.22 Evaluations by the OFCCP Assistant Regional Administrator.
60-741.23 Complaint procedures.

Subpart C—Ancillary Matters

60-741.30 Recordkeeping.

APPENDIX A
APPENDIX B
APPENDIX C

AUTHORITY: Sec. 503 of the Rehabilitation Act of 1973, (29 U.S.C. 793), as amended by sec. 111(a), Pub. L. 93-516, 88 Stat 1619 (29 U.S.C. 706) and by secs. 119 and 122 of the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, 92 Stat. 2955 and Executive Order 11758.

SOURCE: 45 FR 86265, Dec. 30, 1980, unless otherwise noted.

Subpart A—Preliminary Matters, Affirmative Action Clause, Compliance

§ 60-741.1 Purpose and application.

The purpose of the regulations in this Part 60-741 is to assure compliance with section 503 of the Rehabilitation Act of 1973, which requires Government contractors to take affirmative action to employ and advance in employment qualified handicapped individuals. The regulations in this part apply to all Government contracts, including Federal deposit or share insurance, for the furnishing of supplies or services or for the use of personal property (including construction) in excess of $2,500. Compliance of a contractor with the provisions of this part will not necessarily determine its compliance with the requirements of section 504 of the Rehabilitation Act of 1973 and compliance with section 504 will not necessarily determine compliance with section 503 and the regulations in this part.

§ 60-741.2 Coverage and waivers.

(a) *General*—(1) *Transactions for $2,500 or less.* Contracts for $2,500 or less are not covered by the Act. No agency or contractor shall procure supplies or services in less than usual quantities to avoid the applicability of the affirmative action clause.

(2) *Contracts for indefinite quantities.* With respect to indefinite delivery-type contracts (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, "call-type" contracts, and purchase notice agreements), the affirmative action clause shall be included unless the contracting agency has reason to believe that the amount to be ordered in any year under such contract will be $2,500 or less. The applicability of the affirmative action clause shall be determined at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the affirmative action clause shall be applied to such contract whenever the amount of a single order is in excess of $2,500. Once the affirmative action clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) *Work outside of the United States.* The requirements of the affirmative action clause are waived with respect to contracts with regard to work performed outside of the United States by employees who were not recruited within the United States.

(4) *Contracts with state or local governments.* The requirements of the af-

firmative action clause in any contract with a state or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

(5) *Facilities not connected with contracts.* The Director may waive the requirements of the affirmative action clause with respect to any of a contractor's facilities which he or she finds to be in all respects separate and distinct from activities of the contractor related to the performance of the contract, provided that he or she also finds that such a waiver will not interfere with or impede the effectuation of the Act. Such waivers shall be considered only upon the request of the contractor.

(b) *Waivers*—(1) *Specific contracts and classes of contracts.* The head of an agency, with the concurrence of the Director, may waive the application to any contract of any part of or all the affirmative action clause when he or she deems that special circumstances in the national interest so require. The agency head, with the concurrence of the Director, may also grant such waivers to groups or categories of contracts of the same type where it is (i) in the national interest, (ii) found impracticable to act upon each request individually, and (iii) where such waiver will substantially contribute to convenience in administration of section 503 of the Act.

(2) *National security.* Any requirement set forth in the regulations in this Part 60-741 shall not apply to any contract whenever the head of the contracting agency determines that such contract is essential to the national security and that its award without complying with such requirements is necessary to the national security. Upon making such a determination the head of the agency will notify the Director in writing within 30 days.

(c) *Withdrawal of waiver.* When a waiver has been granted for any class of contracts under this section other than contracts granted waivers under paragraph (b)(2) of this section, the Director may withdraw the waiver for a specific contract or group of contracts to be awarded, when in his or her judgment such action is necessary or appropriate to achieve the purposes of the Act. The withdrawal shall not apply to contracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

[45 FR 86265, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

§ 60-741.3 Affirmative action clause.

Each agency and each contractor and subcontractor shall include the following affirmative action clause in each of its covered Government contracts (and modifications, renewals, or extensions thereof if not included in the original contract).

Affirmative Action for Handicapped Workers

(a) The contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: Employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(b) The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(c) In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(d) The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, provided by or through the contracting officer. Such notices shall state the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified handicapped employees and applicants for employment, and the rights of applicants and employees.

(e) The contractor will notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of section 503 of the Rehabilitation Act of 1973, and is committed to take affirmative action to employ and advance in employment physically and mentally handicapped individuals.

(f) The contractor will include the provisions of this clause in every subcontract or purchase order in excess of $2,500 unless exempted by rules, regulations, or orders of the Secretary issued pursuant to section 503 of the Act, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director of the Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

§ 60-741.4 Applicability of the affirmative action program requirement.

(a) Within 120 days of the commencement of a contract, every Government contractor which has 50 or more employees and (1) has a contract of $50,000 or more or (2) has contracts (at least one of which exceeds $2,500) which total $50,000 or more in any 12-month period shall prepare and maintain an affirmative action program at each establishment which shall set forth the contractor's policies, practices and procedures in accordance with § 60-741.5 of this part. This program may be integrated into or kept separate from other affirmative action programs of the contractor which OFCCP requires it to maintain pursuant to this chapter.

(b) The affirmative action program shall be reviewed and updated annually. If there are any significant changes in procedures, rights or benefits as a result of the annual updating, those changes shall be communicated to employees and applicants for employment.

(c) The contractor shall submit the affirmative action program within 15 days of a request from OFCCP. The contractor shall also submit the affirmative action program upon OFCCP's request when a complaint is being investigated or a preaward compliance review is being conducted.

(d) The full affirmative action program shall be available to any employee or applicant for employment for inspection upon request. The location and hours during which the program may be obtained shall be posted at each establishment.

(e)(1) The contractor shall invite all applicants and employees who believe themselves covered by the Act and who wish to benefit under the affirmative action program to identify themselves to the contractor. The invitation shall state that the information is voluntarily provided, that it will be kept confidential, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with the Act and the regulations in this part. If an applicant or employee so identifies himself or herself, the contractor should also seek the advice of the applicant or employee regarding proper placement and appropriate accommodation. (An acceptable form for such an invitation is set forth in Appendix B attached.)

(2) Nothing in this section shall preclude an employee from informing a contractor at any future time of his or her desire to benefit under the program.

(3) Nothing in this section shall relieve a contractor of its obligation to take affirmative action with respect to those applicants or employees of whose handicap the contractor has actual knowledge: *Provided,* That the contractor is not obligated to search the medical files of any applicant or

employee to determine the existence of a handicap.

(4) Nothing in this section shall relieve a contractor from liability for discrimination under the Act.

§ 60-741.5 Affirmative action policy, practices, and procedures.

(a) *General requirements.* Under the affirmative action obligation imposed by section 503 of the Rehabilitation Act of 1973, contractors are required to take affirmative action to employ and advance in employment qualified handicapped individuals at all levels of employment, including the executive level. Such action shall apply to all employment practices, including, but not limited to, the following: Hiring, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(b) *Proper consideration of qualifications.* Contractors shall review their personnel processes to determine whether their present procedures assure careful, thorough and systematic consideration of the job qualifications of known handicapped applicants and employees for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. To the extent that it is necessary to modify their personnel procedures, contractors shall include the development of new procedures for this purpose in their affirmative action program required under this part. These procedures must be designed so as to facilitate a review of the implementation of this requirement by the contractor or the Government. (Appendix C attached is an example of an appropriate set of procedures. The procedures in Appendix C are not required and contractors may develop other procedures which are appropriate to their circumstances.)

(c) *Physical and mental qualifications.* (1) The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the review of all physical or mental job qualification requirements to ensure that, to the extent qualification requirements tend to screen out qualified handicapped individuals, they are job related and are consistent with business necessity and the safe performance of the job.

(2) Whenever a contractor applies physical or mental job qualification requirements in the selection of applicants or employees for employment or other change in employment status such as promotion, demotion or training, to the extent that qualification requirements tend to screen out qualified handicapped individuals, the requirements shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and the safe performance of the job. The contractor shall have the burden to demonstrate that it has complied with the requirements of this paragraph.

(3) Nothing in this section shall prohibit a contractor from conducting a comprehensive medical examination prior to employment provided that the results of such an examination shall be used only in accordance with the requirements of this section. Whenever a contractor inquires into an applicant's or employee's physical or mental condition or conducts a medical examination prior to employment or change in employment status information obtained in response to such inquiries or examination shall be kept confidential except that:

(i) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped individuals and regarding accommodations; and

(ii) First aid and safety personnel may be informed, where and to the extent appropriate, if the condition might require emergency treatment; and

(iii) Government officials investigating compliance with the Act shall be informed.

(d) *Accommodation to physical and mental limitations of employees.* A contractor must make a reasonable accommodation to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business. In determining the extent of

a contractor's accommodation obligations, the following factors among others may be considered: (1) business necessity and (2) financial cost and expenses.

(e) *Compensation.* In offering employment or promotions to handicapped individuals, the contractor may not reduce the amount of compensation offered because of any disability income, pension or other benefit the applicant or employee receives from another source.

(f) *Outreach, positive recruitment, and external dissemination of policy.* Contractors shall review their employment practices to determine whether their personnel programs provide the required affirmative action for employment and advancement of qualified handicapped individuals. Based upon the findings of such reviews, contractors shall undertake appropriate outreach and positive recruitment activities, such as those listed below. It is not contemplated that contractors will necessarily undertake all the listed activities or that their activities will be limited to those listed. The scope of a contractor's efforts shall depend upon all the circumstances, incuding the contractor's size and resources and the extent to which existing employment practices are adequate.

(1) The contractor should develop internal communication of its obligation to engage in affirmative action efforts to employ qualified handicapped individuals in such a manner as to foster understanding, acceptance and support among the contractor's executive, managment, supervisory and all other employees and to encourage such persons to take the necessary action to aid the contractor in meeting this obligation.

(2) The contractor should develop reasonable internal procedures to ensure that its obligation to engage in affirmative action to employ and promote qualified handicapped individuals is being fully implemented.

(3) The contractor should periodically inform all employees and prospective employees of its commitment to engage in affirmative action to increase employment opportunities for qualified handicapped individuals.

(4) The contractor should enlist the assistance and support of recruiting sources (including state employment security agencies, state vocational rehabilitation agencies or facilities, sheltered workshops, college placement officers, state education agencies, labor organizations and organizations of or for handicapped individuals) for the contractor's commitment to provide meaningful employment opportunities to qualified handicapped individuals. (A list of numerous national organizations serving the handicapped, many of which have state or local affiliates, is found in the "Directory of Organizations Interested in the Handicapped" published by the Committee for the Handicapped People-to-People Program, Washington, D.C.)

(5) The contractor should engage in recruitment activities at educational institutions which participate in training of the handicapped, such as schools for the blind, deaf, or retarded.

(6) The contractor should establish meaningful contacts with appropriate social service agencies, organizations of and for handicapped individuals, vocational rehabilitation agencies or facilities, for such purposes as advice, technical assistance and referral of potential employees. Technical assistance from the resources described in this paragraph may consist of advice on proper placement, recruitment, training and accommodations contractors may undertake, but no such resource providing technical assistance shall have the authority to approve or disapprove the acceptability of affirmative action programs.

(7) The contractor should review employment records to determine the availability of promotable and transferable qualified known handicapped individuals presently employed, and to determine whether their present and potential skills are being fully utilized or developed.

(8) The contractor should include handicapped workers when employees are pictured in consumer, promotional or help wanted advertising.

(9) The contractor should send written notification of company policy to all subcontractors, vendors and suppli-

ers, requesting appropriate action on their part.

(10) The contractor should take positive steps to attract qualified handicapped persons not currently in the work force who have requisite skills and can be recruited through affirmative action measures. These persons may be located through the local chapters of organizations of and for handicapped individuals described in paragraph (f)(4) of this section.

(g) *Internal dissemination of policy.* A strong outreach program will be ineffective without adequate internal support from supervisory and management personnel and other employees, who may have had limited contact with handicapped persons in the past. In order to assure greater employee cooperation and participation in the contractor's efforts, the contractor should adopt, implement and disseminate this policy internally as follows:

(1) Include it in the contractor's policy manual.

(2) Publicize it in the company newspaper, magazine, annual report and other media.

(3) Conduct special meetings with executive, management, and supervisory personnel to explain the intent of the policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude.

(4) Schedule special meetings with all employees to discuss policy and explain individual employee responsibilities.

(5) Discuss the policy thoroughly in both employee orientation and management training programs.

(6) Meet with union officials to inform them of the contractor's policy, and request their cooperation.

(7) Include nondiscrimination clauses in all union agreements, and review all contractual provisions to ensure they are nondiscriminatory.

(8) Include articles on accomplishments of handicapped workers in company publications.

(9) Post the policy on company bulletin boards, including a statement that employees and applicants are protected from coercion, intimidation, interference or discrimination for filing a complaint or assisting in an investigation under the Act.

(10) When employees are featured in employee handbooks or similar publications for employees, include handicapped employees.

(h) *Responsibility for implementation.* An executive of the contractor should be designated as director or manager of company affirmative action activities under these regulations. His or her identity should appear on all internal and external communications regarding the company's affirmative action programs. This executive should be given necessary top management support and staff to manage the implementation of this program, including the following activities:

(1) Develop policy statements, affirmative action programs, and internal and external communication techniques. The latter techniques should include regular discussions with local managers, supervisors and employees to be certain the contractor's policies are being followed. In addition, supervisors should be advised that:

(i) Their work performance is being evaluated on the basis of their affirmative action efforts and results, as well as other criteria.

(ii) The contractor is obligated to prevent harassment of employees placed through affirmative action efforts, as set forth in 41 CFR 60-1.28.

(2) Identify problem areas in conjunction with line management and known handicapped employees, in the implementation of the affirmative action programs, and develop solutions. This is particularly important for the accommodations requirements.

(3) Design and implement audit and reporting systems that will:

(i) Measure effectiveness of the contractor's programs.

(ii) Indicate need for remedial action.

(iii) Determine the degree to which the contractor's objectives have been attained.

(iv) Determine whether known handicapped employees have had the opportunity to participate in all company sponsored educational, training, recreational and social activities.

(v) Ensure that each location is in compliance with the Act and the regulations in this part.

(4) Serve as liaison between the contractor and OFCCP.

(5) Serve as liaison between the contractor and organizations of and for handicapped persons, and arrange for the active involvement by company representatives in the community service programs of local organizations of and for the handicapped.

(6) Keep management informed of the latest developments in the entire affirmative action area.

(7) Arrange for career counseling for known handicapped employees.

(i) *Development and execution of affirmative action programs.* (1) Job qualification requirements reviewed pursuant to paragraph (c) of this section should be made available to all members of management involved in the recruitment, screening, selection, and promotion process.

(2) The contractor should evaluate the total selection process including training and promotion to ensure freedom from stereotyping handicapped persons in a manner which limits their access to all jobs for which they are qualified.

(3) All personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes should be carefully selected and trained to ensure that the commitments in the contractor's affirmative action program are implemented.

(4) Formal briefing sessions should be held, preferably on company premises, with representatives from recruiting sources. Plant tours, clear and concise explanations of current and future job openings, position, descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefings. Formal arrangements should be made for referral of applicants, follow up with sources, and feedback on disposition of applicants.

(5) A special effort should be made to include qualified handicapped persons on the personnel relations staff.

(6) Handicapped employees should be made available for participation in career days, youth motivation programs, and related activities in their communities.

(7) Recruiting efforts at all schools should incorporate special efforts to reach handicapped students.

(8) An effort should be made to participate in workstudy programs with rehabilitation facilities and schools which specialize in training or educating handicapped individuals.

(9) The contractor should use all available resources to continue or establish on the job training programs.

(j) *Sheltered workshops.* Contracts with sheltered workshops do not constitute affirmative action in lieu of employment and advancement of qualified handicapped individuals in the contractor's own workforce. Contracts with sheltered workshops may be included within an affirmative action program if the sheltered workshop trains employees for the contractor and the contractor is obligated to hire trainees at full compensation when such trainees become qualified as "qualified handicapped individuals" as defined in this chapter.

[45 FR 86265, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

§ 60-741.6 Determination of handicap.

(a) Any handicapped individual filing a complaint with the Director under this part shall submit with his or her complaint a signed statement specifying the handicapping impairment or situation (see 41 CFR 60-1.3 definition of "handicapped individual"). If the Director determines that further documentation is necessary, he or she may require the complainant to provide additional information.

(b) Any contractor requiring a determination of an applicant's or employee's handicap may require the applicant or employee to provide medical documentation of the impairment or, in the alternative, may require the applicant or employee to undergo a medical examination at the contractor's expense.

(c) Any determination of handicap required pursuant to paragraph (b) of this section must meet the requirements of § 60-741.5(c) and must be for the purpose of affirmative action and proper job placement. Information ob-

tained therefrom shall not be used to exclude or otherwise limit the employment opportunities of qualified handicapped individuals.

(d) All medical documentation required under this section shall be based upon the American Medical Association Guides to the Evaluation of Permanent Impairment, provided that the Guides shall be used only to determine the existence of impairment without regard to the degree of impairment.

[45 FR 86265, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

§ 60-741.7 Listing of employment openings.

Contractors should request state employment security agencies to refer qualified handicapped individuals for consideration under their affirmative action programs.

Subpart B—General Enforcement and Complaint Procedure

§ 60-741.20 Subcontracts.

Each nonexempt contractor shall include the affirmative action clause prescribed in § 60-741.3 in each of its nonexempt subcontracts. The clause may be incorporated by reference in accordance with 41 CFR 60-1.46.

§ 60-741.21 Duties of agencies.

Each agency shall cooperate with the Director in the performance of his or her responsibilities under the Act. Such cooperation shall include the responsibility to ensure that contractors are fully cognizant of their obligations under the Act and this part, to provide the Director with any information which comes to its attention that the contractor is not in compliance with the Act or this part, and to take such actions for noncompliance as set forth in this chapter as may be ordered by the Director.

[45 FR 86265, Dec. 30, 1980; 46 FR 7334, Jan. 23, 1981]

§ 60-741.22 Evaluations by the OFCCP Assistant Regional Administrator.

The Assistant Regional Administrators, OFCCP, shall be primarily responsible for undertaking such investigations of complaints against contractors and conducting compliance reviews as may be necessary to assure that the purposes of the Act are being carried out effectively.

§ 60-741.23 Complaint procedures.

(a) *Filing complaints.* Complaints shall be filed within 180 days of the alleged violation unless the time for filing is extended for good cause shown.

(b) *Where to file.* Complaints may be filed with the OFCCP, 200 Constitution Avenue, N.W., Washington, D.C. 20210, or with any OFCCP regional or area office.

(c) *Contents of complaints.* Complaints must be signed by the complainant or an authorized representative and must contain the following information: (1) Name and address (including telephone number) of the complainant; (2) name and address of the contractor who committed the alleged violation; (3) a description of the act or acts considered to be a violation; (4) a statement that the alleged discriminatee is handicapped, has a history of a handicap, has documentation of impairment, or was regarded by the contractor as having an impairment; and (5) any other pertinent information available which will assist in the investigation and resolution of the complaint, including the name of any known Federal agency with which the employer has contracted. Complaints alleging class-type violations which do not identify the alleged discriminatee or discriminatees will be accepted, provided the other requirements of this paragraph are met. Signed third party complaints which do not identify the alleged discriminatee will be accepted, whether or not the third party signing the complaint is an authorized representative provided that the other information required by this paragraph is included.

(d) *Incomplete information.* If a complaint contains incomplete information, OFCCP shall seek the needed information from the person who filed the complaint. If the information is not furnished within 60 days of the date of the request, the case may be closed.

(e) *Investigations.* The OFCCP shall institute a prompt investigation of each complaint, and shall be responsible for developing a complete case record.

(f) *Referral to contractor.* When a complaint concerns an employee of a contractor and the contractor has an applicable internal review procedure, the complaint may be referred to the contractor for processing under that procedure if the employee gives his/her consent. The contractor shall be informed of the elements of the complaint either by being furnished a copy or a sanitized version. The complaint and all actions taken thereunder shall be kept confidential by the contractor. If the contractor is able to resolve the complaint to the satisfaction of the employee prior to the OFCCP investigation, the contractor shall notify OFCCP of the results in writing within 60 days of the referral. The case will be closed upon verification with the employee.

(g) *Resolution of matters.* (1) If the complaint investigation shows no violation of the Act or regulations in this part, or if the matter is not referred to the Office of the Solicitor for consideration of legal enforcement proceedings, the matter shall be closed and the complainant shall be so notified.

(2) If an investigation indicates that the contractor has not complied with the requirements of the Act, efforts shall be made to secure compliance through conciliation and persuasion within a reasonable time. Before the contractor can be found to be in compliance, it must make a specific commitment in accordance with the procedure in 41 CFR 60-1.26.

(3) When a complaint investigation or compliance review indicates a violation of the Act, and the matter has not been resolved by informal means. OFCCP may refer the matter in accordance with the procedure in 41 CFR 60-1.29(a) for consideration of any action authorized under 41 CFR 60-1.29. After a matter arising under the Act is referred to the Office of the Solicitor, the provisions of 41 CFR 60-1.29 through 60-1.31 shall be applicable to the matter in the same way those provisions apply to a matter arising under Executive Order 11246.

Subpart C—Ancillary Matters

§ 60-741.30 Recordkeeping.

(a) Each contractor shall maintain for a period not less than one year records regarding complaints and actions taken thereunder, and such employment or other records as required by the Director or by this part and shall furnish such information in the form required by the Director or as the Director deems necessary for the administration of the Act.

(b) Failure to maintain complete and accurate records as required under this section or failure to update annually the affirmative action program as required by § 60-741.4(b) constitutes noncompliance with the contractor's obligations under the Act and is a ground for the imposition of appropriate sanctions.

Appendix A—Guidelines on the Application of the Definition "Handicapped Individual"

The Rehabilitation Act of 1973, as amended, defines a handicapped individual for the purposes of the program as any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such an impairment.

"Life activties" may be considered to include communication, ambulation, selfcare, socialization, education, vocational training, employment, transportation, adapting to housing, etc. For the purpose of section 503 of the Act, primary attention is given to those life activities that affect employability.

The phrase *"substantially limits"* means the degree that the impairment affects employability. A handicapped individual who is likely to experience difficulty in securing retaining or advancing in employment would be considered substantially limited.

"Has a record of such an impairment" means that an individual may be completely recovered from a previous physical or mental impairment. It is included because the attitude of employers, supervisors, and coworkers toward that previous impairment may result in an individual experiencing difficulty in securing, retaining, or advancing in employment. The mentally restored and those who, for example, have had heart attacks or cancer often experience such difficulty. Also, this part of the definition would include individuals who may have been erroneously classified and may experience dis-

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crimination based on this misclassification. This group may include persons such as those who have been misclassified as mentally retarded or mentally restored.

"Is regarded as having such an impairment" refers to those individuals who are perceived as having a handicap, whether an impairment exists or not, but who, because of attitudes or for any other reason, are regarded as handicapped by employers or supervisors who have an effect on the individual securing retaining or advancing in employment.

Appendix B

1. This employer is a Government contractor subject to section 503 of the Rehabilitation of Act of 1973, which requires Government contractors to take affirmative action to employ and advance in employment qualified handicapped individuals. If you have such a handicap and would like to be considered under the affirmative action program, please tell us. Submission of this information is voluntary and refusal to provide it will not subject you to discharge or disciplinary treatment. Information obtained concerning individuals shall be kept confidential, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of handicapped individuals, and regarding necessary accommodations, (ii) first aid and safety personnel may be informed, when and to the extent appropriate, if the condition might require emergency treatment, and (iii) Government officials investigating compliance with the Act shall be informed.

2. If you are handicapped, we would like to include you under the affirmative action program. It would assist us if you tell us about (1) any special methods, skills and procedures which qualify you for positions that you might not otherwise be able to do because of your handicap, so that you will be considered for any positions of that kind, and (2) the accommodations which we could make which would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job, or other accommodations.

Appendix C

The following is a set of procedures which contractors may use to meet the requirement of § 60-741.5(b).

(1) The application or personnel form of each known handicapped applicant should be annotated to identify each vacancy for which the applicant was condsidered, and the form should be quickly retrievable for review by the Department of Labor and the contractor's personnel officials for use in investigations and internal compliance activities.

(2) The personnel or application records of each known handicapped employee should include (i) the identification of each promotion for which the handicapped employee was considered, and (ii) the identification of each training program for which the handicapped employee was considered.

(3) In each case where a handicapped employee or applicant is rejected for employment, promotion or training, a statement of the reason should be appended to the personnel file or application form. This statement should include a comparison of the qualifications of the handicapped appliance or employee and the person(s) selected, as well as a description of the accommodations considered. This statement should be available to the applicant or employee concerned upon request.

(4) Where applicants or employees are selected for hire, promotion or training and the contractor undertakes any accommodation which makes it possible for the contractor to place a handicapped individual on the job, the application form or personnel record should contain a description of that accommodation.

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Material Approved for Incorporation by Reference

The Director of the Federal Register approves the following incorporations by reference effective July 1, 1982, unless otherwise noted (5 U.S.C. 552(a) and 1 CFR Part 51). For more information on incorporation by reference, see the preliminary pages of this volume.

41 CFR CHAPTER 50 (PARTS 50-1 TO 50-999)
PUBLIC CONTRACTS, DEPARTMENT OF LABOR

41 CFR

Agricultural Research Service, Department of Agriculture
Science and Education Administration, National Agricultural Library, Photo Duplication Division, Beltsville, MD 20705
Respiratory Devices for Protection Against Certain Pesticides, ARS-33-76-2 204.2(a)(4)
(Copies of this standard are also available for inspection and copying at the addresses provided for in the Department of Labor's other submissions for 41 CFR Chapter 50)
The following standards are available for inspection and copying at the following locations:

Technical Data Center: Frances Perkins Department of Labor Bldg., Room N2439, 200 Constitution Ave. N.W., Washington, DC 20210.

Boston Regional Office—Region I: Regional Administrator, U.S. Department of Labor—OSHA, 16-18 North St., 1 Dock Square Bldg., 4th Fl., Boston, MA 02109.

New York Regional Office—Region II: Regional Administrator, U.S. Department of Labor — OSHA, 1515 Broadway (1 Astor Plaza), Room 3445, New York, NY 10036.

Philadelphia Regional Office—Region III: Regional Administrator, U.S. Department of Labor—OSHA, Gateway Bldg., Suite 2100, 3535 Market St., Philadelphia, PA 19104.

Atlanta Regional Office—Region IV: Regional Administrator, U.S. Department of Labor—OSHA, 1375 Peachtree St., NE., Suite 587, Atlanta, GA 30309.

Chicago Regional Office—Region V: Regional Administrator, U.S. Department of Labor—OSHA, 32nd Fl., Room 3263, 230 S. Dearborn St., Chicago, IL 60604.

Dallas Regional Office—Region VI: Regional Administrator, U.S. Department of Labor—OSHA, 555 Griffin Square Bldg., Room 602, Dallas, TX 75202.

Kansas City Regional Office—Region VII: Regional Administrator, U.S. Department of Labor—OSHA, 911 Walnut St. Room 3000, Kansas City, MO 64106.

Denver Regional Office—Region VIII: Regional Administrator, U.S. Department of Labor—OSHA, Federal Bldg., Room 1554, 1961 Stout St., Denver, CO 80294.

San Francisco Regional Office—Region IX: Regional Administrator, U.S. Department of Labor—OSHA, 11349 Federal Bldg., 450 Golden Gate Ave., P.O. Box 36017, San Francisco, CA 94102.

Seattle Regional Office—Region X: Regional Administrator, U.S. Department of Labor—OSHA, Federal Office Bldg., Room 6003, Seattle, WA 98174.

American Conference of Governmental Industrial Hygenists
Threshold Limit Values for Air-borne Contaminents for 1968..... 50-204.50(a)(1)

American Welding Society, Inc.
Pamphlet A-6.0-1965, Safe Practices for Welding and Cutting Containers that Have Held Combustibles. 50-204.72

Compressed Gas Association, Inc.
Pamphlet C-6-1978, Standards for Visual Inspection of Compressed Gas Cylinders. 50-204.65

	41 CFR
Pamphlet C–8–1962, Standard for Requalification of ICC–3HT Cylinders.	50–204.65
Pamphlet G–1–1966, Acetylene	50–204.66(a)
Pamphlet G–1.3–1959, Acetylene Transmission for Chemical Synthesis.	50–204.66(b)
Pamphlet G–1.4–1966, Standard for Acetylene Cylinder Charging Plants.	50–204.66(c)
Pamphlet G–4–1966, Oxygen	50–204.67
Pamphlet G–5.1–1961, Standard for Gaseous Hydrogen Systems at Consumer Sites.	50–204.68
Pamphlet G–5.2–1966, Standard for Liquefied Hydrogen Systems at Consumer Sites.	50–204.68
Pamphlet G–8.1–1964, Standard for the Installation of Nitrous Oxide Systems at Consumer Sites.	50–204.69
Pamphlet P–1–1965, Safe Handling of Compressed Gases	50–204.70
Pamphlet S–1.1–1963 and 1965 Addenda, Safety Release Device Standards—Cylinders for Compressed Gases.	50–204.71
Pamphlet S–1.2–1963, Safety Release Device Standards—Cargo and Portable Tanks for Compressed Gases.	50–204.71
National Committee on Uniform Traffic Laws and Ordinances	
Uniform Vehicle Code-1962 Edition—Chapters 10, 11, 12, and 14	50–204.75

41 CFR CHAPTER 60 (PARTS 60–1 TO 60–999)
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, DEPARTMENT OF LABOR

American Medical Association	
535 N. Dearborn St., Chicago, IL 60610	
Guides to the Evaluation of Permanent Impairment—1971	60–741.6(d)

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List of CFR Sections Affected

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60-2.2 Revised 2970
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60-50.1 (a) corrected 3511
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29-1.5000—29-1.5004 (Subpart 29-1.50) *Removed 12249
29-26 *Added 12249

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60-2.1 *Amended 5630
*Effective date deferred until 5-15-74 13264
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60-2.11 *(a) redesignated as (b); new (a) added 5630

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50-201.604 (e) added 57805
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51-5.1-2 (b) revised 26906
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